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Abstract

Recent ECJ case law regarding the taxation of investment funds seems to include elements of mutual recognition, which is a rare phenomenon in the Court's doctrine on direct taxation. Expanding on the rather clear positions of the Court in *E. Veronsaajien oikeudenvallontayksikkö* (Case C-480/19) and *A SCPI* (Case C-342/20), this two-part article strives towards taking a comprehensive and more systematic examination of the issue. Embedded into a broader dogmatic analysis, it will, with certain qualifiers, conclude that mutual recognition elements can be of relevance to the Court when testing national fund taxation systems under the fundamental freedoms.

Keywords

EU tax law, investment fund taxation, mutual recognition, EU direct taxation, fundamental freedoms

1. Introduction – mutual recognition in fund taxation; two recent examples

This article forms the final part of a series of papers that the author has written on the taxation of income paid to and received by investment funds under EU law.¹ The commencement of the

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1. Some parts of the present article are – inevitably – based on prior research. This is particularly true for section 3, which is a framework chapter included in other articles as well as descriptions of the cases and references to literature analysed in prior research. The novelty provided by this paper lies in the more detailed, broader and more systematic analysis of
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research interest was formed by two recent Finnish investment fund cases, specifically, *E v. Veronsaajien oikeudenvalvontayksikkö*² involving individual taxation of an individual receiving dividends from a non-resident fund and *A SCPI* involving the taxation of Finnish source income paid to non-resident funds.³ The analysis of these latter cases indicates that the ECJ is taking a new perspective in the comparability analysis which, given the in part harsh critique on the Court's approach to comparability, seems very notable.⁴ The author suspected this to be some sort of shift towards mutual recognition.⁵ Yet, considering the inherent incompatibility of mutual recognition and direct tax law, the author is hesitant to make this claim without comprehensively examining the situation in a more detailed and systematic manner. This article subsequently aims to respond to this and will, with various qualifications, suggest that mutual recognition elements have, indeed, been the fundament of the mentioned Finnish cases and, when searching for it, may also be included in other case law on investment fund tax regimes.

The article will be published in two parts and will proceed as follows. Section 2 will introduce readers to the essence of mutual recognition (section 2.A), the essence of the ECJ's doctrine in direct taxation (section 2.B), and will explain why these concepts hardly fit together (section 2.C). Thereupon, the author will briefly elaborate on the key elements of fund taxation regimes (section 3) after which the relevant case law is discussed from the perspective of mutual recognition. Section 5 will summarize the factual and normative, takeaways provided in section 4 and aims to set an agenda for future research. Section 6 will conclude.

2. The (difficult) relationship between tax law and mutual recognition

A. The essentials of mutual recognition

The principle of mutual recognition is of immense relevance in EU law and is not only but especially, a key concept in the development of the Internal Market.⁶ In its very essence, it sets out a

the topic of mutual recognition in fund cases – something that was not proper to discuss in the prior papers. This article also discusses further case law. For the earlier parts of the research project, see: M. Scherleitner, 'E, Veronsaajien Oikeudenvalvontayksikkö C-480/19: A Remarkable Case', 50 *Intertax* (2022a); M. Scherleitner, 'The ECJ's Decision in A SCPI (C-342/20) – A Missing Piece of One Puzzle and a New Piece of Another?' 62 *European Taxation* (2022); M. Scherleitner, 'The Fundamental Freedoms and the Taxation of Dividends Received by Non-Resident Investment Funds: Some Thoughts on Non-Discrimination With a Special Focus on Recent ECJ Case Law', 50 *Intertax* (2022b).

2. Case C-480/19 *E, Veronsaajien oikeudenvalvontayksikkö*, EU:C:2021:334; M. Scherleitner, 50 *Intertax* (2022a), p. 367.

3. Case C-342/20 *A SCPI v. Veronsaajien oikeudenvalvontayksikkö*, EU:C:2022:276; M. Scherleitner, 62 *European Taxation* (2022), p. 443.

4. More broadly on the comparability analysis on which the Court relies in investment fund cases, including the critical account of scholarship on the Court's approach, see M. Scherleitner, 50 *Intertax* (2022b), p. 484.

5. M. Scherleitner, 50 *Intertax* (2022a), p. 374–375; M. Scherleitner, *European Taxation* (2022), p. 449–450.

6. Instead of many, with further references and in more detail, W. Roth, 'Mutual Recognition', in P. Koutrakos and J. Snell (eds.), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar, 2017), p. 427; M. Möstl, 'Preconditions and Limits of Mutual Recognition', 2 *Common Market Law Review* (2010); C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013); the contributions in F. Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan, 2005); J. Ghosh, 'Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition', 16 *Cambridge Yearbook of European Legal Studies* (2014); and see C. Barnard, *The Substantive Law of the EU – The Four Freedoms* (Oxford University Press, 2019), p. 88 et seq.

mode of cooperation between national legal systems.⁷ Its genesis goes back to the case law up to and including *Cassis de Dijon*,⁸ in which the Court held that goods that have lawfully been produced and marketed in one Member State may also be lawfully marketed in other Member States⁹ unless the host Member State can bring forward a mandatory requirement, for which achieving the measure is necessary.¹⁰ The element of necessity expressed in *Cassis de Dijon* then created the essential foundation for later case law declaring the application of national rules to be disproportionate insofar as the rules of the home state effectively address the public interest pursued by the host state.¹¹ In this context, mutual recognition is, in essence, a question of equivalence. If the goal that the national rule seeks to protect is already safeguarded by an equivalent norm in the other Member State, mutual recognition must prevail.¹²

Although it took the Court until 2009 to explicitly refer to a principle of mutual recognition,¹³ the concept has gained primary status for all of the fundamental freedoms.¹⁴ *Sensu stricto*, mutual recognition is a matter of proportionality.¹⁵ The refusal to recognize a good, person, or service because of non-compliance with national requirements that are already equivalently fulfilled in another

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7. More generally speaking, mutual recognition is relevant far beyond internal market law. On the one hand, mutual recognition plays a role in the EU criminal justice area. See on that in detail and instead of many, e.g. C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 131 et seq.; K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', 3 *Il Diritto dell'Unione Europea* (2015); on the other hand, it is encountered in the sphere of international trade law. See, including further references, W. Roth, in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, p. 429, who also refers to the possibility that Member States may unilaterally recognise foreign acts which has a long-standing tradition with respect to judgments of foreign courts.
 8. Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, EU:C:1979:42. See, on the genesis of the principle in the case law up to Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* in more detail, e.g. C. Janssens, *The Principle of Mutual Recognition in EU Law*. For a critical account on the actual role of mutual recognition in Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, see J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014).
 9. Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 14.
 10. *Ibid.*, para. 8. See further Case C-261/81 *Walter Rau Lebensmittelwerke v. De Smedt PVBA*, EU:C:1982:382.
 11. W. Roth, in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, p. 436.
 12. Case 251/78 *Denkavit*, EU:C:1979:252, para. 22; Case 272/80 *Biologische Producten BV*, EU:C:1981:312, para. 14–15; see further on equivalence, including abundant references to case law, C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 31 et seq.
 13. Case C-110/05 *Commission of the European Communities v. Italian Republic*, EU:C:2009:66, para. 34; earlier, Case C-184/96 *Commission of the European Communities v. French Republic*, EU:C:1998:495, para. 1, mutual recognition was mentioned but, as stressed in literature, not in its capacity of a judicially developed principle. See C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 12.
 14. See, in more detail and with further references, e.g. C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 14–24; W. Roth, in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*; with respect to the free movement of workers see Case C-76/90 *Säger*, EU:C:1991:331, para. 12; Case C-288/89 *Gouda*, EU:C:1991:323, para. 11, et seq. See C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 14–15 for that and an analysis of cautious moves by the court into this direction in Case 16/78 *Choquet*, EU:C:1978:210; Cases 110 and 111/78 *Wesemael*, EU:C:1979:8; Case C-340/89 *Vlassopoulou*, EU:C:1991:193; Case C-104/91 *Aguirre Borrell*, EU:C:1992:202; Case C-313/01 *Morgenbesser*, EU:C:2003:612, para. 61; Case C-55/94 *Gebhard*, EU:C:1995:411; Case C-210/06 *Cartesio*, EU:C:2008:723; Case C-212/97 *Centros*, EU:C:1999:126; Case C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, EU:C:2002:632; Case C-167/01 *Inspire Art*, EU:C:2003:512; with respect to the free movement of capital, see, e.g. Case C-279/00 *Commission v. Italy*, EU:C:2009:66.
 15. C. Janssens, *The Principle of Mutual Recognition in EU Law*.

Member State is disproportionate.¹⁶ The inquiry is thus whether the degree of equivalence that exists between the regulatory systems imposed a duty of mutual recognition on one Member State.¹⁷ *Sensu lato*, mutual recognition can also become relevant at earlier stages of the examination and also prevail, in the absence of a proportionality test, in cases that lack a valid imperative requirement to justify the non-application (or non-recognition) of foreign legislation or actions.¹⁸

It is worth emphasizing that literature underlines that, under certain circumstances, the duty of mutual recognition can be imposed in the absence of any equivalence test.¹⁹ This concerns cases in which the equivalence requirement went beyond what is necessary to protect the interest at stake.²⁰ Similarly, the ECJ has also implemented mutual recognition in the absence of an equivalent level of protection. This happened, for instance, in company law cases which is a field of law with close ties to tax law.²¹ Furthermore, as discussed in literature, there are certain lines of case law in which the Court refrains from imposing mutual recognition despite there being (potential) equivalence.²² The examples brought forward to make this point concern areas that are politically sensitive such as, for instance, gambling, public health care,²³ and also substantive direct taxation as will be shown in section 2.C.²⁴

B. The essentials of the ECJ's doctrine in direct tax law

Bluntly, and yet in sufficiently indicative terms, direct tax law is special, and the ECJ also treats it as such.²⁵ From the perspective of this article, the following instances appear to be especially relevant. First, direct tax law is, thus far, only minimally harmonized among EU Member States.²⁶ Practically, and institutionally, this is a result of the area being carved out from the ordinary legislative procedure

16. Ibid., footnote 126.

17. Ibid., p. 25–26, 31 et seq.

18. Ibid., p. 25–26, 31 et seq.

19. See, in more detail, *ibid.*, p. 24.

20. Ibid., referring to Case C-288/89 Gouda, para. 12; Case C-76/90 Säger, para. 16–17.

21. Case C-212/97 Centros; Case C-167/01 Inspire Art; See for that and further references to other sectors in which such an approach was used, C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 34.

22. C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 35 et seq.

23. See *ibid.*, and the references to case law concerning gambling, the free movement of services in public health care, and Case C-244/06 *Dynamic Medien*, EU:C:2008:85 concerning a matter of youth protection.

24. The special role of taxation in the mutual recognition doctrine is also accepted in Internal Market literature. See C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 47–48.

25. For an analysis of the impact of the fundamental freedoms on Member States' direct taxation systems, see, e.g., N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law* (IBFD, 2012), ch. 12–18; J. Kokott, *Das Steuerrecht der Europäischen Union* (Beck, 2018), para. 79 et seq.; P. Wattel, 'Conceptual Background of CJEU Case Law', in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law* (Wolters Kluwer, 2019); M. Helminen, *EU Tax Law* (IBFD, 2021), ch. 2; J. Englisch and E. Reimer, 'Diskriminierungs- und Beschränkungsverbote im direkten Steuerrecht', in H. Schaumburg and J. Englisch (eds.), *Europäisches Steuerrecht* (Otto Schmidt, 2020); J.A.M. Korving, *Internal Market Neutrality* (Sdu Uitgevers The Hague, 2019); C.H.J.I. Panayi, *European Union Corporate Tax Law* (Cambridge University Press, 2021), sec. 3.2.; J. Englisch, 'Grundfreiheiten: Vergleichbarkeit, Rechtfertigung und Verhältnismäßigkeit', in M. Lang (ed.), *Europäisches Steuerrecht* (DStJG Tagungsband, Otto Schmidt, 2018), p. 280; B. Strassburger, *Die Dogmatik der EU-Grundfreiheiten: Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung* (Mohr Siebeck, 2012), p. 7.

26. For the ambitious plan of the Commission regarding the harmonization of business taxation-related rules, see Commission Business taxation in the 21st century, COM(2021) 251 final). For a seminal step forward in direct tax integration, see Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, [2022] OJ L 328/1–58. See further on

of 114 TFEU which results in tax harmonization efforts falling under Article 115 TFEU and, thus, the special legislative procedure.²⁷ The TFEU, as stated by AG Kokott, underlines the sovereignty of Member States in taxation matters.²⁸ The overall sensitivity of the topic, including the fact that the Member States are politically accountable for taxation, has resulted in fierce resistance towards the Commission's attempt to change decision-making mechanisms via the passerelle clause in Article 48(7) TFEU.²⁹

Secondly, most direct tax regimes in the world³⁰ – and all of the EU – tax persons who are a resident and economic events taking place in their territory.³¹ This results in a compartmentalization of tax systems with the exercise of overlapping tax claims resulting in double taxation.³² This wedge between persons and assets inside and outside a Member State's territory exists even if Member States' tax systems are completely identical.³³ Yet, the distortions are exacerbated by the fact that they are not.³⁴ As stressed in literature, this is a key difference when compared to the general logic of Internal Market law. From an international tax perspective, it matters whether the taxpayer or sources of income stay or leave a jurisdiction while this should not make a difference from an Internal Market perspective.³⁵

Thirdly, and essentially in the context of the above, the ECJ case law on direct taxation under the fundamental freedoms is dominated by a non-discrimination approach. It is not a (non-discriminatory) restriction approach as is typical in other areas of fundamental freedoms

recent developments in international tax governance, e.g. S. Kingma, *Inclusive Global Tax Governance in the Post-BEPS Era* (IBFD, 2020).

27. The carve-out is included in Article 114(2) TFEU. See, in more detail and for a broader discussion, e.g. G. Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation', in C.H.J.I. Panayi, W. Haslehner and E. Traversa (eds.), *Research Handbook on European Union Taxation Law* (Elgar, 2020); S. Korte, 'Art. 115 (ex-Art. 94 EGV) [Richtlinien zur Angleichung von Rechtsvorschriften für den Binnenmarkt]', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (Beck, 2016).
28. Opinion of Advocate General Juliane Kokott in Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft. v. Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága*, EU:C:2014:47, para. 84.
29. European Commission, Towards a more efficient and democratic decision making in EU tax policy COM(2019) 8; that was not picked up by the Council. See Council of the European Union, 'Outcome of the Council Meeting: 3671st Council meeting Economic and Financial Affairs', 6301/19, p. 4–5.
30. In broad terms, there is a wide variety of specialties that tax systems can have in addition to or instead of territorial taxation. For instance, some states, such as especially the US, tax based on nationality, and some states, such as the Cayman Island, do not tax income at all. Furthermore, there are tax systems that essentially only tax economic events taking place in their territory – also with respect to residents. For the sake of clarity, it may be worth stressing that the notion of territorial taxation is used differently by economists who tend to refer to territorial tax regimes as being such that (usually) exempt foreign active income from taxation. See, e.g., IMF, *Corporate Taxation in the Global Economy* (IMF, 2019), para. 44. This is rather frequent for EU Member States that have a wide tax treaty network and exempt income attributable to foreign permanent establishments of residents (even though, under domestic law, the resident taxpayer is subject to tax on his worldwide income).
31. E.g. W. Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?', 69 *Bull. Int'l Tax'n* (2015), p. 280.
32. In more conceptual detail on the relevant case law that underlies the ECJ's acceptance of such territorial compartmentalization, see P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, sec. 14.2.
33. See, including a more detailed discussion, W. Schön, 69 *Bull. Int'l Tax'n* (2015), p. 280.
34. Compare *ibid.*
35. P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, sec. 14.2.

law.³⁶ The latter could, given that taxes have, per se, a restrictive effect, result in Member States need to justify every tax with the Court being able to assess its proportionality.³⁷ This would not be workable and, furthermore, would expose Member States to a level of Court control that would not sit well with their sovereignty.³⁸ To borrow a famous metaphor from the recently deceased doyen of European tax law, Frans Vanistendael, 'The European tax landscape is no big snooker table that spans the whole internal market on which all balls are meant to run smoothly. Rather, it is a room containing 27 different snooker tables that should be accessible in a non-discriminatory manner.'³⁹

Taking account of territoriality and sovereignty equals an imperfect internal market in direct taxation.⁴⁰ The ECJ is – with some exceptions and frictions – essentially aiming towards ensuring tax neutrality from the perspective of the single Member State.⁴¹ The latter must not treat a cross-border situation worse than a comparable domestic situation. In principle, this is in conjunction with a unilateral perspective that, in its purest form, requires disregarding foreign law for the purposes of scrutinizing national law under the fundamental freedoms.⁴² This is also what underlies the ECJ's statements based on which Member States are not obligated to take account of the possible adverse consequences arising from the particularities of the legislation of another Member State or to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation that removes all disparities arising from national tax rules.⁴³ Likewise, it underlies the fundamental decision that the TFEU does not address juridical double taxation that results from 'the exercise in parallel by two Member States of their fiscal sovereignty'.⁴⁴

C. Are mutual recognition and direct tax law conceptually unfit?

Mutual recognition is understood to play a rather minor role in direct taxation.⁴⁵ This is an immediate consequence of the prevailing unilateral perspective in scrutinizing national tax

36. Literature complains about the confusion that the ECJ creates by using the term 'restriction' in an undifferentiated manner. See, e.g., J. Englisch, in M. Lang (ed.), *Europäisches Steuerrecht*, p. 280; Opinion of Advocate General Michal Bobek in Case C-382/16 *Hornbach-Baumarkt*, EU:C:2017:974, para. 39–40. For a more comprehensive elaboration, see N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, sec. 13.4.3; J. Snell, 'Non-discriminatory Tax Obstacles in Community Law', 56 *International & Comparative Law Quarterly* (2007), p. 365–366; K. Banks, 'The Application of the Fundamental Freedoms to Member State Tax Measures: Guarding Against Protectionism or Second-guessing National Policy Choices?', 33 *European Law Review* (2008); J.A.M. Korving, *Internal Market Neutrality*, p. 85 et seq.

37. Going back to F. Vanistendael, 'The Compatibility of the Basic Economic Freedoms with the Sovereign National Tax Systems of the Member States', 12 *EC Tax Review* (2003), p. 141 et seq.

38. E.g. P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, sec. 14.2.; J. Kokott, *Das Steuerrecht der Europäischen Union*, p. 125 et seq.

39. Similarly used in, e.g. W. Schön, 69 *Bull. Int'l Tax'n* (2015), sec. 3.7.

40. *Ibid.*

41. See further, e.g. W. Schön, 69 *Bull. Int'l Tax'n* (2015), sec. 2.3.4. or, e.g. J. Graetz and A.C. Warren, 'Income Tax Discrimination and the Political and Economic Integration of Europe', 115 *Yale Law Journal* (2006), p. 1220 et seq.

42. W. Schön, 69 *Bull. Int'l Tax'n* (2015).

43. E.g. Case C-157/07 *Berlin v. Krankenhaus Ruhesitz am Wannsee Seniorenheimstatt GmbH*, EU:C:2008:588, para. 49–50.

44. Case C-513/04 *Kerckhart Morres v. Belgium*, EU:C:2006:242, para. 20. See more on this in section 2.C.

45. See, in more detail on the (rather minor) role of mutual recognition in direct taxation, e.g. E. Reimer, 'Taxation: An Area without Mutual Recognition?', in I. Richelle, W. Schön and E. Traversa (eds.), *Allocating Taxing Powers*

law.⁴⁶ Mutual recognition, on the other hand, is explicitly concerned with what is called a global view which is a perspective that takes account of foreign law.⁴⁷ That being said, it is necessary to refine these statements.

The absence of mutual recognition is clear with respect to substantive tax claims. Consider, for illustration, the following example. A person receives foreign dividend income. The taxpayer's residence state taxes its worldwide income based on its residence.⁴⁸ At the same time, the state of the dividend-paying company taxes the foreign dividend recipient on the basis of the income having its source in this state.⁴⁹ Given that there is a nexus to both states, both can tax under international law – and very frequently they will, as a starting point, also want to do so.⁵⁰ The income is thus taxed twice in the hands of the same person (juridical double taxation).⁵¹ The fundamental problem from the perspective of mutual recognition lies in the fact that one Member State cannot fulfil the interest of another Member State to tax by taxing. Ultimately, both want to tax.⁵²

While this is true as it stands, it seems worthwhile to take a closer look on how states typically address the matter. In fact, while double taxation is the natural outcome of the interaction of most states' (and factually all Member States') tax systems (both tax the event due to the territorial connection), there are measures in place that aim to address the resulting double taxation. These are known as double taxation conventions.⁵³ This means that the question of the mutual recognition of tax claims only reaches the ECJ in cases in which Member States have not already themselves agreed on how to allocate the specific tax claim.⁵⁴ In principle, the ECJ could now act as some sort of final arbitrator and allocate the taxation right itself with a view to taking away juridical double taxation. However, in the *Kerckhaert Morres* line of case law, the Court refused to take on this role and emphasized that the TFEU does not lay down criteria as to which state is to be obligated to renounce its tax claim and thereby implicitly mutually recognize that of the other state.⁵⁵ What is interesting in this respect is the fact that the Court made this statement without it, strictly speaking, having been

within the European Union (Springer, 2013), p. 203; C. Waldhoff, 'Das Anerkennungsprinzip im Steuerrecht', in T. Eilmannberger et al. (eds.), *Anerkennungs-/Herkunftslandprinzip in Europa* (Linde, 2009), p. 195–209; See also, including further perspectives, J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014). See further, S. Dorigo, 'Mutual Recognition versus Transnational Administration in Tax Law: Is Fiscal Sovereignty Still Alive?', 13 *Review of European Administrative Law* (2020).

46. See section 2.B.

47. Ibid.

48. Fundamentally see, e.g. J. Kokott, 'Chapter 1: Public International Law and Taxation: Nexus and Territoriality', in E. Traversa (ed.), *Tax Nexus and Jurisdiction in International and EU Law* (IBFD, 2022), and see for the lively discussion of these concepts in contemporary tax policy, the further contributions in E. Traversa (ed.), *Tax Nexus and Jurisdiction in International and EU Law* (IBFD, 2022). See further A. Schindler and A. Atchabahan, 'General Report', in IFA (eds.), *Source And Residence: A New Configuration of Their Principles* (IFA Cahiers, 2005).

49. Ibid.

50. Compare also footnote 29.

51. This is to be opposed to what is referred to as economic double taxation that is concerned with the taxation of the same income in the hands of two different persons. In the above example, this concerns the corporate tax paid by the company distributing the (after tax) dividend and the taxation of the dividend at the level of the recipient.

52. J. Snell, 56 *International & Comparative Law Quarterly* (2007), p. 365–366.

53. Sometimes, this is also achieved by unilateral matters. See generally on double tax conventions (usually referred to as tax treaties), E. Reimer and A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions* (Kluwer, 2022).

54. Or have unilaterally renounced taxing in the specific circumstance.

55. Case C-513/04 *Kerckhaert Morres v. Belgium*, para. 22.

necessary.⁵⁶ The Court may thus be understood as taking an especially conscious and fierce stance against mutual recognition in substantive tax law towards emphasizing that it is the Member States and not the Court who makes that type of allocation of taxation rights.⁵⁷ This is particularly so as the Court – on a sober reflection – could well have decided the matter differently. After all, the ECJ treats the OECD Model tax convention as some sort of ‘gold-standard’ of international tax allocation⁵⁸ and, in some cases, it has also assigned the taxation right to one of the involved Member States.⁵⁹ As a result, it would not appear totally unthinkable that the Court could have developed a doctrine towards providing for a last resort Court-made allocation of taxation rights for the sake of avoiding juridical double taxation.⁶⁰ The fact that the latter did not happen reinforces the above observation of the Court actively sending a sign of not being willing to interfere in this context – despite the severe consequences that unresolved juridical double taxation has on the Internal Market.⁶¹ Furthermore, it points towards the Court not regarding the (mere) act of taxation to be some

56. See in more detail on this, N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, sec. 14.2.6.2.5: In essence, the Court had to deal with a situation in which Belgium, as a residence state, taxed a dividend that was subject to WHT in France. Belgium taxed the dividends in the same way that it taxes internal dividends. Hence, at stake was a form of discrimination that is less often discussed at the level of the ECJ, namely whether the application of the same rules concerns different situations. Thus, the question was whether the taxation of the dividend in the other Member State renders the situation to be incomparable. According to the Court, it does not because the position of the shareholder receiving the dividend is ‘not necessarily altered’ by the fact that the dividends are subject to WHT in the source state. See Case C-513/04 Kerckhart Morres v. Belgium, para. 19. Importantly, the discrimination analysis stops here, and the case could have simply been over. However, it was not. The Court went on and made the above-mentioned famous statement on the irrelevance of adverse consequences resulting from the parallel exercise of taxation rights. Bammens correctly regards this a separate analysis of the case under the (non-discriminatory) restriction approach. The declaration, or confirmation, that this clear (non-discriminatory) restriction is not prevented by the TFEU is the actual ground-breaking element of the case. See further for a similar type of argumentation in the context of the Case C-120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014), p. 200, according to which the case could have been decided merely based on the indirectly discriminatory effect of the measure and the absence of a justification.

57. See for proposals of how to address the issue, e.g. M. Helminen, *The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty* (IBFD, 2014).

58. For the expression, see, W. Schön, 69 *Bull. Int’l Tax’n* (2015), sec. 2.3.2, under reference to Case C-107/94 *P. H. Asscher v. Staatssecretaris van Financiën*, EU:C:1996:251, para. 47; Case C-234/01 *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, EU:C:2003:340, para. 45; Case C-513/03 *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/ Ondernemingen buitenland te Heerlen*, EU:C:2006:131, para. 48; Case C-470/04 *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, EU:C:2006:525, para. 44–46; Case C-414/06 *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*, EU:C:2008:278, para. 22.

59. *Ibid.*

60. Similarly, J. Englisch, ‘Europäisches Steuerrecht’, in Seer et al. (eds.), *Steuerrecht* (Otto Schmidt, 2021), p. 200. For proposals regarding the refinement of the existing case law, see, e.g. D. Gutmann, ‘How to Avoid Double Taxation in the European Union?’, in I. Richelle, W. Schön, and E. Traversa (eds.), *Allocating Taxing Powers within the European Union* (Springer, 2013).

61. With respect to economic double taxation, that is, the taxation of the same income in the hands of two different persons, jurisprudence is more nuanced. See, for instance, high-profile cases including imputation systems such as Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:773; Case C-315/02 *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, EU:C:2004:446; Case C-319/02 *Manninen*, EU:C:2004, p. 484; Joined Cases C-436/08 *Haribo Lakritzen Hans Riegel Betriebs GmbH* and C-437/08 *Österreichische Salinen AG v. Finanzamt Linz*, EU:C:2011:61; See further, e.g. H. Vermeulen, ‘Cross-Border Dividend Taxation’, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law* (Wolters Kluwer, 2019).

sort of common and overarching goal that can serve as a basis for mutual recognition.⁶² This is, in turn, an interesting contrast to the below cases that involve certain values that can form the basis for mutual recognition.

Apart from the above rather clear stance of the ECJ on the inaccessibility of tax claims for mutual recognition, the situation is more nuanced. In fact, there are various situations when the principle can be relevant. In this regard, it seems key to emphasize that scholars tend to take a rather diverging view as to what to classify as mutual recognition and what not.⁶³ Given that it is a very broad and versatile concept, this is neither surprising nor does it matter.⁶⁴ Nonetheless, some clarifications on the understanding of the concept for the purposes of this article may be on point.

To begin with, it should be noted that there are a number of instances in which the Court left a strict unilateral perspective and took account of another state's law for the purposes of assessing the compatibility of national law under the freedoms.⁶⁵ This raises the preliminary question as to whether such a global view is already to be equated with mutual recognition given that this amounts to a requirement to take account of a decision made by the foreign legislator for the purposes of domestic law.⁶⁶ When following such a broader understanding, mutual recognition may be detected in the various lines of cases in which some sort of global view

62. Compare C. Waldhoff, in T. Eilmansberger et al. (eds.), *Anerkennungs-/Herkunftslandprinzip in Europa*, p. 207.

63. A rather narrow view in classifying Court decisions as signs of mutual recognition is, for instance, taken by J. Kokott, *Das Steuerrecht der Europäischen Union*, p. 71 et seq. A rather broad stance, on the other hand, seems to be followed by J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014), p. 191, 213; for differentiated views, see, e.g. E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds.), *Allocating Taxing Powers within the European Union*; C. Waldhoff, in T. Eilmansberger et al. (eds.), *Anerkennungs-/Herkunftslandprinzip in Europa*; N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*; P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, sec. 14.5.

64. See especially, C. Janssens, *The Principle of Mutual Recognition in EU Law*, and the references provided in section 2.A for further discussions.

65. For a discussion of the case law, see, for example, C.H.J.I. Panayi, *European Union Corporate Tax Law*, sec. 3.3.4.; J. di Maria, 'Comparability in the Case of Hybrid Mismatch: In Search of an Approach Suitable for the Current European Landscape', in K. Dziurdz and C. Marchgraber (eds.), *Non-Discrimination in European and Tax Treaty Law* (Linde, 2015). The merits of these deviations have been passionately discussed in literature. Critique regarding the departures from the unilateral perspective, e.g., and with further references, W. Schön, 69 *Bull. Int'l Tax'n* (2015); P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*; E. Reimer, 'Diskriminierungs- und Beschränkungsverbote im direkten Steuerrecht', in H. Schaumburg and J. Englisch (eds.), *Europäisches Steuerrecht* (Otto Schmidt, 2020); G. Kofler, 'Tax Treaty "Neutralization" of Source State Discrimination under the EU Fundamental Freedoms?', 65 *Bull. Int'l Tax'n*, (2011), p. 684-690; in favour, e.g. E. Kemmeren, 'The Internal Market Approach Should Prevail over the Single Country Approach', in L. Hinnekens and P. Hinnekens (eds.), *A Vision of Taxes within and outside European Borders – Festschrift in Honor of Frans Vanistendael* (Kluwer, 2008), p. 555-586.

66. Such a broader position seems to be supported, e.g., by J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014), p. 191, who states; "mutual recognition" is a judicial technique used by the CJEU, whereby the (conceptually distinct) questions of whether the internal market provisions are breached, whether such breach is justified and whether any such justification is proportionate, in scrutinising the domestic laws of any one particular Member State, are answered by what happens in a different Member State. In other words, "mutual recognition" is a principle which requires scrutiny not only of the application of the internal market provisions to a particular Member State but the interaction of that Member State's laws under scrutiny with those of another.' Compare further the positions taken by E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds.), *Allocating Taxing Powers within the European Union*; and C. Waldhoff, in T. Eilmansberger et al. (eds.), *Anerkennungs-/Herkunftslandprinzip in Europa*.

prevailed.⁶⁷ Furthermore, it underlies the (growing) amount of secondary EU law that links the tax treatment of an event in one Member State to the tax treatment in another.⁶⁸ Under a stricter understanding of the concept, on the other hand, the global view is merely a first step for mutual recognition but not yet mutual recognition itself.⁶⁹ The latter is rather concerned with the factual replacement of domestic rules by equivalent foreign rules.⁷⁰ There are a handful of instances in direct tax law where this is relevant.⁷¹ One aspect, for instance, is the acceptance of a taxpayer's foreign nationality, or its legal personality as a corporate body.⁷² Another concerns procedural requirements⁷³ and, again, another is included in the ECJ's case law on charitable

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67. In more detail on the various deviations from the one-country approach, see, e.g. P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, sec. 14.5., who summarizes the relevant case law as the 'Always-Somewhere' or 'One-Market' approach (which essentially amounts to cases concerned allowing a deduction at least somewhere), including, for instance, Case C-168/01 *Bosal Holding*, EU:C:2003:479; Case C-446/03 *Marks & Spencer*, EU:C:2005:763; Case C-293/06 *Deutsche Schell*, EU:C:2008:129; Case C-470/04 *N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, ECLI:EU:C:2006:525; the 'Follow-Secondary EU Law or the OECD Model' approach (concerned with the Court's attempts to not upset settled international tax law), including, for instance, Joined Cases C-436/08 *Haribo Lakritzen Hans Riegel Betriebs GmbH* and C-437/08 *Österreichische Salinen AG v. Finanzamt Linz*, as well as the 'Overall Approach: Neutralisation in the Other Jurisdiction' (concerned with the discrimination caused by one state being undone by what happens in another state) including, for instance, Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL v. Ministre de l'Économie, des Finances et de l'Industrie*, EU:C:2006:783.
68. See E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds), *Allocating Taxing Powers within the European Union*, p. 200, who regards the imputation credit included in Article 4 of the Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), OJ L 345 as being a form of mutual recognition duty imposed by secondary EU law. Following this logic, also elements of the – later introduced – Consolidated text: Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193 and Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144 can be seen as imposing mutual recognition duties. This is the case for the controlled foreign company (CFC) rules and anti-hybrid rules, that, in different situations, link the tax treatment of income in one state to that in another. The recently accepted Council Directive (EU) 2022/2523 of 15 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328 carries that even further.
69. A similar understanding seems to underlie the classification of P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, sec. 14.5., who sees the 'Mutual Recognition Approach' as a distinct deviation from the one-country approach. The other three deviations have already been mentioned in footnote 66.
70. For a different perspective, see J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014), p. 191.
71. See, for accounts of this topic in literature, e.g. E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds), *Allocating Taxing Powers within the European Union*.
72. See, E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds), *Allocating Taxing Powers within the European Union*, sec. 1.3.1. and further in sec. 3.1., stating in sec. 3.1.1. that, when tax rules tie the concept of tax personality for a foreign entity upon personality under private law or any other branch of law, these rules are of relevance in the duty of the Member State to recognize both the existence and the parameters of legal personality as determined by the state of origin. For more detail on how states deal with the qualification of foreign entities see e.g. M. Lang and C. Staringer, 'General Report', in IFA (eds.), *Qualification of Taxable Entities and Treaty Protection* (IFA Cahiers, 2014), sec. 2.3.; for an analysis of the European law dimensions relating to this, see, e.g., S. Hochheim, *Der Typenvergleich aus europarechtlicher Sicht* (Frankfurt am Main, 2009).
73. In Case C-250/95 *Futura and Singer*, EU:C:1997:239, the ECJ required the state of a branch to acknowledge the book-keeping and files that the taxpayer maintains in the home state. In this regard, it is worth clarifying that the reference to another Member State's bookkeeping is not in conjunction with a duty to accept the profit or loss calculated under foreign rules for tax purposes. Thus far and subject to restrictions imposed by primary EU law, Member States decide themselves on what constitutes their tax base – including rules on the calculation of the income of investment

organizations.⁷⁴ Given that this line of case law shows strong conceptual similarities to the subject matter of this research (in each case at stake is the granting of a special tax status to an entity based on certain conditions), a more comprehensive examination may be required.⁷⁵

While Member States can decide themselves whether they want to grant special treatment to charitable organizations and, if so, what type,⁷⁶ they must uphold it also with respect to charitable organizations from other Member States.⁷⁷ As held by the Court in *Stauffer*:

[T]he fact remains that where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, (...) the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.⁷⁸

As a result, a foreign charitable organization that promotes an interest different to what is supported by relevant domestic legislation is in a situation that is not comparable to that of a domestic charitable organization.⁷⁹ On the contrary, a foreign body that is recognized as a charitable organization in another Member State that aims to promote the same objective that is promoted by the domestic charitable body is in a comparable situation. Thus, it must not be discriminated against

funds. Still, and this was the point in *Futura*, a Member State cannot demand also keeping books in another Member State, if the necessary information – that protects the interest of safeguarding effective fiscal supervision which was the accepted justification at stake – can be delivered based on the books kept in the home state.

74. E.g. J. Kokott, *Das Steuerrecht der Europäischen Union*, p. 71. See for the relevant cases, Case C-386/04 *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, EU:C: 2006:568; Case C-318/07 *Hein Persche v. Finanzamt Lüdenscheid*, EU:C:2009:33; Case C-25/10 *Missionswerk Werner Heukelbach eV v. Belgian State*, EU:C:2011:65; Case C-10/10 *European Commission v. Republic of Austria*, EU: C:2011:399; and Case C-485/14 *European Commission v. French Republic*, EU: C:2015:506. See also Case C-133/13 *Staatssecretaris van Economische Zaken en Staatssecretaris van Financiën tegen Q*, EU:C:2014:2460; Case C-87/13 *Staatssecretaris van Financiën tegen X*, EU:C:2014:2459.

75. Notably, the connection of case law on charities and funds has been thematized in specialist literature. See, e.g., G. Genta, 'Dividends Received by Investment Funds: An EU Law Perspective – Part 2', 53 *European Taxation* (2013); D. Gutmann, S. Austy, and P. Le Roux, 'Tax Treatment of Foreign Pension Funds', 49 *European Taxation* (2009), p. 21–25.

76. Case C-386/04 *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, para. 39. See in more detail on the broader topic of charitable organizations in EU tax law, S. Hemels, 'Charitable Organisations', in C.H.J.I. Panayi, W. Haslechner and E. Traversa (eds.), *Research Handbook on European Union Taxation Law* (Elgar, 2020); The contributions in F. Vanistendael (ed.), *Taxation of Charities* (IBFD, 2015); and S. Heidenbauer, *Charity Crossing Borders: The Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe* (Kluwer Law International, 2011).

77. Case C-386/04 *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, para. 40 et seq. See also Case C-318/07 *Hein Persche v. Finanzamt Lüdenscheid*, para. 43 et seq.; Case C-25/10 *Missionswerk Werner Heukelbach eV v. Belgian State*, para. 32 et seq. See further, Case C 10/10 *European Commission v. Republic of Austria*, para. 30 et seq.; and Case C-485/14 *European Commission v. French Republic*.

78. Case C-386/04 *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, para. 40.

79. See in this regard Case C-133/13 *Staatssecretaris van Economische Zaken en Staatssecretaris van Financiën tegen Q*, para. 20 et seq. and Case C-87/13 *Staatssecretaris van Financiën tegen X*, para. 27 et seq.

unless there is a justification available.⁸⁰ Stated differently, Member States are not obligated to automatically mutually recognize the status of foreign charities as such.⁸¹ However, the global approach to comparability, including its contextualization in light of the overall goals of the source Member State's own regime for charitable organizations⁸² leads to an outcome that has similar effects as those of mutual recognition: Member States first decide whether they want to introduce a tax privileged status into their tax system of which the fulfilment is bound to certain criteria. If so, this becomes the yardstick for comparability and, as a consequence, Member States must, in effect, recognize foreign rules that underlie a foreign decision to introduce an equivalent framework as equivalent. As a result, a Member State has to accept the regulatory framework of another Member State if it protects the same interest, and unless it can justify not doing so. Even though those who call this 'another piece of the mosaic of the fundamental freedoms in their colour as guarantees of non-discrimination in classical outbound cases'⁸³ are correct; this does not mean that those who regard this as a piece of the mosaic of mutual recognition are wrong. Rather, it seems that two facet-rich concepts accord closely with each other.⁸⁴

In the remainder of this article, it will be key to inquire whether such a connection can also exist in the context of investment funds. The question is thus whether the ECJ, in scrutinizing the relevant national rules from a non-discriminatory approach, laid the foundation for an interpretation of the fundamental freedoms towards factually leading to an outcome that requires Member States to mutually recognize foreign investment fund taxation systems as equivalent to their own provided the former protect the same goal as the latter? It is then for the reader to either classify this as a non-discrimination approach seasoned with mutual recognition elements or outright mutual recognition.

3. Essentials of investment fund taxation⁸⁵

Investment funds may be defined as an 'entity, which collects capital from a number of investors to create a pool of money that is then re-invested into stocks, bonds, and other assets'.⁸⁶ While all

80. Compare id. See further also J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014), who provides for interesting conceptual critique on the principle of mutual recognition as being rather redundant as a principle separate from non-discrimination and market access.

81. Which is why literature correctly states that there is no mutual recognition of charities as such, i.e., different approaches of Member States are allowed. See, e.g., S. Hemels, in C.H.J.I. Panayi, W. Haslechner and E. Traversa (eds.), *Research Handbook on European Union Taxation Law* (Elgar, 2020), at sec. 4.2. E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds.), *Allocating Taxing Powers within the European Union*, sec. 3.1.5.

82. It may be worth underlining that, in tax cases, the comparability analysis is frequently conducted in light of the object and purpose of the rules at stake. This approach has been criticized in literature. See, instead, J. Englisch, in M. Lang (ed.), *Europäisches Steuerrecht*, p. 281 et seq.; E. Reimer, in H. Schaumburg and J. Englisch (eds.), *Europäisches Steuerrecht*; B. Strassburger, *Die Dogmatik der EU-Grundfreiheiten: Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung*, p. 171 et seq.; M. Scherleitner, 50 *Intertax* (2022b).

83. E. Reimer, in I. Richelle, W. Schön and E. Traversa (eds.), *Allocating Taxing Powers within the European Union*, p. 209.

84. See for a more critical account, J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014).

85. This chapter was inevitably included as a framework in the other papers of the series.

86. Which has been used as a definition in S. Hwang and O. Weidmann, 'General Report', in IFA (eds.), *Investment Funds* (IFA Cahiers, 2019), under reference to the *Financial Times Glossary* (the link they provided does not work). Further on definitional issues regarding investment funds, see e.g. T. Viitala, *Taxation of Investment Funds in the European Union*, (IBFD, 2005), ch. 2; H. Wegman, *Investor Protection: Towards Additional EU Regulation of Investment Funds?* (Wolters Kluwer, 2016), sec. 2.2., who – to provide for a second definition – states: 'An investment fund is a professionally managed entity that pools money from investors who, in return, receive fund shares or other

funds build on this principal idea, they can differ among various dimensions. For instance, funds may be widely held⁸⁷ or privately held;⁸⁸ open-ended⁸⁹ or closed-ended;⁹⁰ and have different legal forms,⁹¹ organizational structures,⁹² investment policies,⁹³ distribution policies⁹⁴ and life-times.⁹⁵ In addition, various funds may be subject to different regulatory treatment.⁹⁶ What matters most for this article is the tax treatment of the fund for which the differentiation between tax opaqueness and tax transparency is made.

To understand the differences, first consider that investment fund structures have three levels at a minimum, that is, the investor, the fund and the investment target. If the fund was subject to tax on the income received by the target⁹⁷ and the investor was subject to tax on the income received by the

participation rights representing a pro rata interest in the fund, and invests that money in one or multiple assets in accordance with its investment policy.' OECD, *The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles* (OECD 2010), para. 1 et seq.

87. Which typically means that they are open to the general public.

88. Privately held funds are held by a small number of typically sophisticated investors.

89. With respect to open-ended funds, the management company redeems the units in the funds at the request of the unit holder. See, with further references, e.g. T. Viitala, *Taxation of Investment Funds in the European Union*, sec. 2.1.4.; H. Wegman, *Investor Protection: Towards Additional EU Regulation of Investment Funds?*, sec. 2.6.

90. Closed-ended funds have a fixed share capital, and there is no obligation to redeem shares or units at the request of the investor. Their shares usually trade on a stock exchange.

91. Investment funds, for instance, can be corporations, contractual arrangements, trusts, or partnerships. See, for an overview, e.g. H. Wegman, *Investor Protection: Towards Additional EU Regulation of Investment Funds?*, sec. 2.7.

92. Next to stand-alone investment funds, there are, e.g., umbrella funds that consist of several sub-funds; a fund of funds which is a fund that invests in other funds (outsourcing the choice of the right funds to a fund manager); as well as master-feeder structures which are funds that consist of separate feeder funds that invest all of their assets into a master fund. See, for an overview, e.g. T. Viitala, *Taxation of Investment Funds in the European Union*, sec. 2.1.4. and in fair detail, H. Wegman, *Investor Protection: Towards Additional EU Regulation of Investment Funds?*, sec. 2.6.

93. In the EFAMA classification report, funds are classified into six main categories including: 'equity, bond, multi-asset, money market, "Absolute Return Innovative Strategies" (ARIS), and other funds'. See EFAMA, *The European Fund Classification EFC Categories 2nd edition 2020* (15 June 2021), <https://www.fundconnect.com/Solutions/Assets/EFC%20Categories%20Report.pdf>.

94. Funds may be distributing the profits to investors or they may accumulate them.

95. Hedge funds as well as open-ended and closed-ended funds typically have an indefinite lifetime while private equity funds have a life cycle that is divided into phases. See S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 36.

96. See Directive 2009/65/EC of the European Parliament and of the Council of 13 Jul. 2009 on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) as amended by Directive 2014/91/EU, OJ L 302, ('the UCITS Directive'). The UCITS Directive has two implementation directives. Directive 2010/42/EU implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures, and notification procedure, OJ L 178, and Directive 2010/43/EU implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organizational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company, OJ L 176; and Directive 2011/61/EU of the European Parliament and of the Council of 8 Jun. 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/2010, OJ L174, ('the AIFM Directive'); see further on investment funds law, e.g. I. Riassetto, 'Introduction to Investment Funds Law', in W. Haslehner (ed.), *Investment Fund Taxation – Domestic Law, EU Law, and Double Taxation Treaties* (Kluwer, 2018).

97. Depending on the investment strategy, this can be, for instance, interest, dividends, rental income or capital gains on the sale of the shares or interest in the investment target. Certain private equity investment structures such as e.g. a distressed buyout structure, can also be regarded as a commercial activity under certain circumstances and thus effectuate

fund,⁹⁸ it would become less attractive for investors to invest via an investment fund as opposed to directly investing in the target. This would be problematic because investing through funds gives rise to various benefits.⁹⁹ As such, there are good policy reasons to aim towards ensuring, or at least promoting, tax neutrality between an investment via the fund and the corresponding direct investment of the fund investor into the target.¹⁰⁰ For this purpose, it is most relevant to eliminate or alleviate the tax burden with respect to one layer in the structure.¹⁰¹

In the context of private equity funds – which are rarely covered by a special tax regime¹⁰² – this mainly works via fiscal self-help. Usually embedded into a more sophisticated structure open to a limited number of professional investors, the pooling vehicle can, for instance, be a company in a tax haven (not subject to tax) or a limited partnership (treated as tax-transparent).¹⁰³ Mutual funds and UCITS – also referred to as mainstream funds – on the other hand, are often subject to some sort of special tax regime that aims to achieve or promote neutrality vis-à-vis direct investment depending on how it is structured.¹⁰⁴ There are different techniques that can be used in this context. Either the income is taxed only at the level of the investor, only at the level of the fund or partially at the level of both the former and the latter.¹⁰⁵ The first option, the taxation of fund income only at the level of the investor, appears to be rather frequent and can be given effect to by either treating the fund as tax-transparent¹⁰⁶ or as a

net income taxation. However, attempts are typically made to try to avoid this. See, e.g., S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, sec. 1.3.

98. On income paid by the fund to the investor or on capital gains realized through selling the participation in the fund
99. Most importantly, they allow investors to diversify their risks and benefits from professional management at a significantly lower cost than what can be achieved in a direct investment. See, e.g., OECD, *The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles*, sec. 2.
100. On the different notions of neutrality involved in investment fund taxation regimes, see S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 18, differing between 'horizontal neutrality' from the perspective of the investor considering a direct investment in the target or an investment via a fund and the – closely related – concept of vertical neutrality. The latter focuses on the economic double taxation of income at the different layers involved in the structure.
101. For the sake of completeness, it should be mentioned that other dimensions also matter from a neutrality perspective. Investments via funds may also give rise to changes in the character of the income and/or the timing of tax payments. Furthermore, it is not always sure for material or simply practical reasons whether the same tax treaty benefits as in the case of a direct investment are available. OECD, *The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles*; R. Prokisch, 'Art. 1. Unter das Abkommen fallende Personen', in K. Vogel and M. Lehner (eds.), *Doppelbesteuerungsabkommen* (Beck, 2015), para. 54a–54g. For hedge funds that hold a portfolio of synthetic investment, the relevance of tax treaties is a different question. See further S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, sec. 1.2.
102. S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, sec. 1.3. Exceptions, of course, exist. For venture capital funds special regimes tend to be more frequent.
103. Ibid. The result is that the income is not taxed at the level of the fund, and neither are the distributions from the fund taxed in the establishment jurisdiction of the fund. It may be worth noting that hedge funds also typically rely on the possibilities provided by the ordinary tax system, i.e. tax transparency, or entities that are not taxed.
104. It may be worth mentioning that not all fund taxation systems fully strive towards achieving full neutrality. Some do not but at least aim towards it. See, in more detail, the general report of the 2019 IFA congress that is based on a significant number of national reports dealing with the taxation of investment funds from their jurisdiction, S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 43 et seq.
105. See, including examples from different country practices, S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 18 et seq. They regard the right for a deduction upon distribution as an additional option. For the corresponding taxation at the investor level, see id., on p. 43 et seq.
106. The general reporters of the 2019 IFA Congress define tax transparency in the context of investment funds in the following way: "Tax transparent", "flow through" "pass through" or "fiscally transparent" means the tax status of an investment fund for the jurisdiction's income tax purposes, whereby (i) the fund itself is not subject to tax on net profits from its investment activities, (ii) its owners are subject to tax on their share of the fund's net profits as allocated

tax-opaque¹⁰⁷ and subjecting it to special tax treatment.¹⁰⁸ Whatever way the fund taxation regime is structured, states need to specify what qualifies for the special treatment awarded by the fund taxation regime and what does not and hence remains in the national tax system.¹⁰⁹

4. Fund taxation and the fundamental freedoms

A. The basic dilemma – a necessary but potentially expensive advantage¹¹⁰

As described above, investment fund tax regimes are concerned with granting special tax treatment to someone in the structure. In real terms, this is not an advantage but the setting off of an otherwise existing disadvantage. Yet, relative to the ordinary tax system, it is an advantage.¹¹¹ From a budgetary perspective, it is not further problematic to grant this advantage in a purely domestic situation because, here, the fund taxation system can take its intended effect. For instance, a Member State that grants a tax exemption to the fund vehicle will tax the domestic investor. The tax outcome is essentially the same as in the case of a direct investment of the domestic investor in the source company – single taxation in the same state.¹¹² Additionally, foreign investors of domestic funds can, in principle, be taxed on the distributions from the fund and capital gains received from the disposal of participation in the fund.¹¹³ The situation, however, is different when the fund is abroad. The Member State can still tax domestic investors on the income received from the foreign fund,¹¹⁴ but they cannot tax a foreign investor in the foreign fund. The latter, however, is what they, subject to the applicable tax treaties, could have done in the case of a direct investment

by the fund and the allocated income retains the source and character as determined at the fund level and (iii) the investors are treated as realising such net profits regardless of the timing of the distribution of the cash corresponding to such net profits. In this regard, the fund's or its agents' activities may be attributed to the owners in determining the character and source of net profits for income tax purposes. In addition, "tax transparency," "flow through," or "pass through" may be made on a net basis (meaning that the profits and losses are calculated at the fund level, then allocated to the investors) or on a gross basis (meaning that each item of income, gain, loss and deduction is allocated to the investors, who include such items in calculating their overall net profit or loss (whether solely with respect to the investment or at the person-wide basis)), or a combination of both.' See, S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 19. As an example, see, e.g., the Austrian tax regime. See for a discussion: A. Bodis and T. Polivanova-Rosenauer, 'Austria', in IFA (eds.), *Investment Funds*, (IFA Cahiers, 2019).

107. S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 13 define the term 'tax opaque' as any tax treatment of an investment that is not tax-transparent as described the preceding footnote). In essence and subject to various caveats, this refers to situations in which the fund is treated, in one way or another, like a distinct entity that is interposed between the investor and the investment through which the income does not simply flow. Compare further OECD, *The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles*.

108. See, S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, sec. 1.2. and the relevant country reports. This is also what underlies many of the below cases.

109. Compare, e.g., also G. Genta, 53 *European Taxation* (2013), p. 143.

110. This section is based on M. Scherleitner, 62 *European Taxation* (2022), sec. 5.1.

111. E.g. *ibid.*

112. For sure, the investment through the fund also incurs costs that are not incurred in a direct investment.

113. Which, notably, countries do not necessarily do. Especially countries that play a strong role in the investment fund industry, usually, do not tax foreigners on income they receive from domestic funds. Under certain circumstances, it may even be the case that countries treat non-resident investors investing in a fund more favourably than investors that invest directly into the underlying asset. S. Hwang and O. Weidmann, in IFA (eds.), *Investment Funds*, p. 48 et seq.

114. They cannot, however, influence the fact that the foreign fund taxation system may have a different character.

of the foreign investor.¹¹⁵ While this exemption may, *ceteris paribus*, increase the inflow of foreign capital, it will go hand in hand with a reduction in tax revenue relative to the situation of the fund investors investing directly.¹¹⁶ The relative merits of these factors will unfold differently for different states,¹¹⁷ but as a long history of ECJ case law shows, many Member States have been attempting to avoid extending benefits that are granted to domestic funds also to foreign funds. Naturally, this is in tension with the – in such cases, normally applicable – free movement of capital¹¹⁸ and, to the extent that this is motivated by Member States' desires to protect their tax claims that they would have on the investor that invests directly, it could be expected that this steady stream of investment fund cases will not so quickly ebb away.¹¹⁹

Thus, what we are confronted with are multi-layered integrated systems that (i) pursue certain neutrality concepts in a certain way but that (ii) Member States tend to be reluctant to extend to cross-border situations due to budgetary reasons. At the same time, it is possible and even likely that the foreign fund is itself subject to a special tax regime that promotes the same or similar underlying values. This is a setting in which the presence of mutual recognition is well conceivable. Below, there will be a search for such elements, first, in the case law on tax-transparent funds (4.B); second, in the case law on tax-exempt funds (section 4.C); and, third, in the case law on fund regimes involving two different taxation techniques (section 4.D).

B. Mutual recognition in cases involving tax-transparent funds

In the context of tax-transparent systems, it is especially the administrative challenges connected to these systems that are to be given attention. As examples of states using tax-transparent fund taxation regimes show, they may attempt to address this issue via connecting tax-transparent treatment to proper reporting and sanction insufficient or inexistent reporting via some sort of estimation of the income.¹²⁰ An important case in this regard is *van Caster & van Caster* (C-326/12). The question arose in it whether Germany is allowed to bind the – usually punishing – lumpsum taxation¹²¹ to the fund's precise fulfilment of documentation and disclosure obligations foreseen in German law.¹²² While the Court held that, based on the principle of fiscal autonomy, Member States

115. This restriction does not exist with respect to investment fund regimes that treat the fund as transparent.

116. As outgoing interest payments are frequently not taxed, this may mainly go jointly with a reduction of dividend taxes.

117. To be clear, this is only a small, unrepresentative portion of the factors that are taken into account in the structuring of investment fund regimes. For instance, administrative considerations may also play a role, especially when the implementation of tax-transparent systems is contemplated. The latter types of fund taxation regimes allow the taxation of foreign investors more easily but may be difficult to administer.

118. While the freedom of establishment was applicable in Case C-303/07 *Aberdeen Property Fininvest Alpha*, EU: C:2009:377, it was the free movement of capital that was relevant in other investment fund cases. See, essentially, all cases discussed in section 4 of this article.

119. M. Scherleitner, 62 *European Taxation* (2022), sec. 5.1.

120. See, for instance, the system at stake in Case C-326/12 *Rita van Caster and Patrick van Caster v. Finanzamt Essen-Süd*, EU:C:2014:2269. Another case on tax-transparent investment funds, Case C-387/10 *Commission v. Austria*, EU: C:2011:625, concerned the question as to whether only national financial institutions and national business trustees may be appointed as tax representatives of investment funds or real property investment funds. The Court held that this violates the freedom to provide services. This case did not have the taxation of funds at its core. Yet, the need for tax representatives has, again, to do with the tax-transparent status of the fund and the related administrative complexity.

121. See, Case C-326/12 *Rita van Caster and Patrick van Caster v. Finanzamt Essen-Süd*, para. 12–13, 26 et seq.

122. On these requirements, *ibid.*, para. 5.

themselves determine what evidence is to be provided to enable tax authorities to correctly establish the tax owed on the income earned from investment funds,¹²³ Germany cannot disallow taxpayers from providing the evidence that could prove the actual amount of the income (and thus allow abstaining from the disadvantageous estimation).¹²⁴ In effect, this means that equivalent foreign documentation has to be accepted. This is a matter of mutual recognition. That being stated, it is not investment fund specific but was already developed in the earlier *Meilicke* case¹²⁵ and only extended to the field of investment funds. Furthermore, the recent *L Fund* case (C-537/20) had to do with a tax-transparent system. Due to the case including certain additional components, it will be discussed in the second part of the article.¹²⁶

C. Mutual recognition in case law on fund taxation regimes offering special tax treatment to funds fulfilling certain criteria

1. Setting the scene – a longer history of fund-related case law. As mentioned in section 3,¹²⁷ it is rather typical for investment fund tax regimes to provide for an exemption of the fund vehicle. A significant amount of investment fund cases that were at the ECJ involved such a system whereby the tax treatment in the source state of income paid to non-resident funds (in tax jargon what is known as outbound payments) has often been at stake. The first wave of ‘outbound’ case law, namely, *Orange European Smallcap Fund*,¹²⁸ *Aberdeen*,¹²⁹ *Santander*,¹³⁰ and *DFA*,¹³¹ involved fund taxation systems that ultimately exempted domestic funds and taxed income paid to non-resident funds.¹³² In these cases, the differentiation was made based on the seat of the fund, and the Court’s solution does not involve mutual recognition. Rather, it transferred the *ACT/Denkavit* line of case law that it developed in the context of ordinary dividend taxation to the realm of investment funds.¹³³ According to that case law, a Member State, in light of rules mitigating economic double taxation, is creating comparability at the moment it is taxing the outgoing dividend since, via so subjecting the dividend to tax, it exposes the non-resident recipient to the same risk of economic double taxation in the source state.¹³⁴ Member States have not been able to justify this inferior tax treatment of payments to foreign funds;¹³⁵ thus, they lost. The above

123. *Ibid.*, para. 47.

124. *Ibid.*

125. Case C-262/09 *Wienand Meilicke and Others v. Finanzamt Bonn-Innenstadt*, EU:C:2011:438.

126. Based on a resemblance test, Germany treated the Luxembourg fund as opaque. As such, it seems better to discuss this case after the analysis of Case C-480/16 *Fidelity Funds and Others v. Skatteministeriet*, EU:C:2018:480.

127. See *ibid.*, sec. 3.

128. Case C-194/06 *Orange European Smallcap Fund*, EU:C:2008:289.

129. Case C-303/07 *Aberdeen Property Fininvest Alpha*.

130. Case C-338/11 *Santander Asset Management SGIIC Santander*, EU:C:2012:286.

131. Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249.

132. M. Scherleitner, 50 *Intertax* (2022b), sec. 2.

133. As summarized in Case C-170/05 *Denkavit Internationaal BV*, para. 34–35, which was delivered two days after Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation*.

134. *Ibid.*

135. See the references provided in footnotes 5–9.

case law shows no direct signs of mutual recognition and suggests that the ECJ remained in a unilateral view.^{136,137}

Importantly, the taxation of the shareholders did not play a role in this examination in these cases because the respective fund tax systems did not make the exemption of the domestic funds dependent on this.¹³⁸ However, there is a case, *Fidelity* (C-480/16), that included a differentiation based on the seat and in which the shareholder's taxation was relevant. As will be shown in more detail below, this case eventually seems to include a mutual recognition element.¹³⁹

Case law that is more recent, on the other hand, often involves investment fund systems that provide for differentiations that are not based on the seat of the fund.¹⁴⁰ Instead, they bind the special tax treatment to the fulfilment of certain criteria, and all funds, domestic or foreign, that fulfil them qualify for it. In such situations, the question is whether a formally neutral tax system factually places cross-border situations at a disadvantage.¹⁴¹

In an attempt to search for mutual recognition elements in this line of case law, it seems worthwhile to begin from the most recent and, *prima facie*, most obvious example of a mutual recognition approach which is *A SCPI*. Based on these insights, there will be a return to earlier case law in order to determine whether this logic is also observable there.

2. A SCPI – the seemingly rather obvious case¹⁴². The *A SCPI* case concerned a French statutory fund¹⁴³ that planned to purchase shares in Finnish real estate companies and directly acquire

136. It may be stressed that different nuances of what constitutes a unilateral view and an internal market view exist. Some authors regard the *ACT/Denkavit* line of case law as an example for a unilateral view. See, e.g., J. di Maria, in K. Dziurdz and C. Marchgraber (eds.), *Non-Discrimination in European and Tax Treaty Law*; P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*; but some, such as E. Kemmeren, in L. Hinnekens and P. Hinnekens (eds.), *A Vision of Taxes within and outside European Borders – Festschrift in Honor of Frans Vanistendael*, seem to regard it as an example for an internal market approach due to the tax treatment of the shareholder being relevant. It does not really matter for the purposes of this article what classification may be taken.

137. However, an important objection must be stressed. In fact, the ECJ – other than the EFTA Court – is also prepared to take a look into the taxation of the recipient of the income in such cases because it allows Member States to uphold a *prima facie* discriminatory tax if, based on a tax treaty, the tax gets fully credited against the tax due at the level of the recipient. Due to the non-resident fund being exempt, an offset of the tax is not possible which means that this so-called *Amurta*-neutralisation is not relevant. See Case C-379/05 *Amurta SGPS*, EU:C:2007:655. For a discussion see, e.g., P. Wattel, in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, p. 644–648.

138. M. Scherleitner, 50 *Intertax* (2022b), sec. 2.

139. See sec. 4.3.6.

140. See, Case C-342/20 *A SCPI v. Veronsaajien oikeudenvälontayksikkö*; Case C-156/17 *Köln-Aktienfonds Deka*, EU:C:2020:51; Case C-478/19 and C-479/19 *UBS Real Estate*, EU:C:2021:1015. This, is not the case for Case C-252/14 *Pensioenfonds Metaal en Techniek (PMT)*, EU:C:2016:402 and Case C-545/19 *AllianzGI-Fonds AEVN*, EU:C:2022:193 and that concern fund taxation systems that differ based on the seat of the fund. However, these cases include another special feature, namely, the involvement of two different taxation techniques.

141. Case C-342/20 *A SCPI v. Veronsaajien oikeudenvälontayksikkö*, para. 55; Case C-156/17 *Köln-Aktienfonds Deka*, para. 55 et seq.; Case C-478/19 and C-479/19 *UBS Real Estate*, para. 39 et seq. See further on the topic of indirect discrimination in an investment fund context, M. Scherleitner, 62 *European Taxation* (2022), sec. 5.2.

142. The author has analysed this case in M. Scherleitner, *European Taxation* (2022), and the preceding AG opinion in M. Scherleitner, 50 *Intertax* (2022b). The question that this article addresses was raised by the author in these earlier papers. The descriptive parts are thus inevitably based on prior work.

143. *Société Civile de Placement Immobilier à Capital Variable*; A SCPI is an alternative investment fund within the meaning of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) 1060/2009 and (EU) 1095/2010, art. 4(1)(a), OJ L 174 (hereinafter AIFM directive (2011/61)). Thus, A is subject to the

Finnish real estate.¹⁴⁴ It applied for a ruling to ensure that it was regarded as tax-exempt, however, the request was denied since *A SCPI* was not a contractual fund.¹⁴⁵ The matter came before the ECJ that regarded this to constitute a restriction of the free movement of capital. While Finnish funds may (and normally will)¹⁴⁶ adopt the legal form that enables them to obtain the exemption, foreign funds are subject to the conditions laid down by the legislation of the Member State in which they are established.¹⁴⁷ This is liable to place domestic funds at an advantage which can consequently deter non-residents from investing in Finland.¹⁴⁸ The Court thus proceeded forward to the comparability analysis. It began by recalling its settled case law according to which comparability is to be analysed in light of the aim of the provision at stake taking into account only the relevant distinguishing criteria laid down by the legislation in question.¹⁴⁹ The Finnish Government underlined that the purpose of the Finnish fund taxation system is to avoid the double taxation of income from investments and to endeavour to treat investments made through funds as direct investments for tax purposes.¹⁵⁰ In light of these rules, the ECJ does not regard the French statutory fund to be in a situation that is different from a contractual fund because such objectives may also be achieved when a statutory fund benefits in the Member State in which it is established from an exemption from income tax or, such as *A SCPI*,¹⁵¹ from a system of tax transparency.¹⁵² The situations were thus comparable.¹⁵³ No justifications were brought forward.

Is this a global view? Yes. The Court looks at the tax treatment in the other state and therewith recognizes the economic nature of investment funds as an inseparable unit of investors and the fund vehicle. The alternative unilateral view was not discussed by the ECJ.¹⁵⁴ The more thrilling question, however, is whether this global view extends to mutual recognition in the narrow sense

supervision of the French Financial Markets Authority. See Case C-342/20 *A SCPI v. Veronsaajien oikeudenvoluntaryksikkö*, para. 10.

144. Case C-342/20 *A SCPI v. Veronsaajien oikeudenvoluntaryksikkö*, para. 14.

145. Note that the application concerned the 2019 and 2020 taxation years. The tax authority granted the exemption in 2019 but not in 2020. At the core of this stands a change in Finnish law that induced the tax authority to provide for a different outcome. See, in more detail, for example, A. Tallgren and J. Juusela, 'Taxation of Corporate-Based Investment Funds in Finland – A SCPI (Case C-342/20) as an Example of Discriminatory Treatment Based on Legal Form', 23 *Fin. & Cap. Mkts* (2022), secs. 2.3. and 3. The decision only deals with the 2020 tax year. See Case C-342/20 *A SCPI v. Veronsaajien oikeudenvoluntaryksikkö*, para. 15–27.

146. The Court recognized that it is, in principle, also possible to create a fund in Finland within the meaning of the AIFM Directive (2011/61) in a statutory form that would not, however, have access to the Finnish fund taxation regime.

147. Case C-342/20 *A SCPI v. Veronsaajien oikeudenvoluntaryksikkö*, para. 63.

148. *Ibid.*, para. 63.

149. *Ibid.*, para. 69–70.

150. *Ibid.*, para. 71.

151. According to *ibid.*, para. 13, the *A SCPI* is tax-transparent.

152. *Ibid.*, para. 74–75, 77. The Court regards this to be, moreover, confirmed by the fact that, under Finnish legislation, a statutory fund is taxed at the level of the fund and investors whereas, for contractual funds, taxation occurs solely at the level of the investors.

153. A second argument against comparability was struck down by the Court. See *ibid.*, para. 72, 76.

154. Interestingly, it seems to have underlain the EU law assessment of the Finnish legislator. As demonstrated by the government bill accomplishing the codification of the Finnish investment fund tax regime, it was emphasized that the Court, in assessing the different tax treatment of investment funds, only takes into account the differentiation criteria set out under national law which is the legal form in Finland. Based on that, the government brought forward the following logic: with the legal form being the decisive criterion, it is enough to extend the exemption only to foreign funds which, based on the same logic that applies in a domestic situation, are seen as funds. The overall goal of the fund taxation system – which takes account of the inseparable layers of funds and is thus global in nature – did not play a role in the argument. See the relevant government bill: Finland, *Hallituksen esitys eduskunnalle laeiksi tuloverolain*

described above. Stated otherwise, is it only taking into account what happens in the other state – which is known from the *Amurta* line of case law,¹⁵⁵ or does it go even further towards recognizing the other state's system fulfilling a goal enshrined in the domestic system which is why the foreign system needs to be regarded as equivalent to the domestic system – which is known from the case law on charities?

Based on *A SCPI*, at least, the latter seems more likely. Just as with charities, Member States are free to foresee a special tax status for investment funds in their tax systems. Just as with charities, they are free to decide to which criteria they bind access to the system. And just as with respect to charities,¹⁵⁶ the source state was forced to accept as equivalent criteria of another state's system, given that they fulfil the same goal. And just as in case of charities, the mutual recognition duty does not go so far that the mere fact that the foreign state assigns to the foreign vehicle the status of a fund (charity) results in the other state having to follow this decision for the purposes of its own law.¹⁵⁷ Rather, it is the goals attached to the tax status in one Member State that form the foundation for determining the equivalence of the tax status in the other Member State.

3. *E, Veronsaajien oikeudenvontayksikkö*. An equally clear case seems to be *E, Veronsaajien oikeudenvontayksikkö* (C-480/19) (hereinafter *E*),¹⁵⁸ which deals with the taxation of income received by a shareholder in an investment fund in her residence state. At stake is, thus, an inbound case. While facts of the case are simple – a Finnish individual receives income from a Luxembourg SICAV¹⁵⁹ – the underlying Finnish law is complex,¹⁶⁰ but essentially boils down to the result that the distributions by the Luxembourg fund are taxed as employment income (rate up to 50%) at the level of the Finnish individual while the taxation of income distributed by Finnish funds is taxed as capital income (rate 30%, or 34%), and the income distributed by Finnish companies (subject to rules mitigating economic double taxation) is subject to a more favourable tax treatment.¹⁶¹ This amounts to a restriction of the free movement of capital.

The following comparability analysis was again conducted in light of the object and purpose of the rules in question, taking into account only the distinguishing criteria established by the

ja rajoitetusti verovelvollisen tulon verottamisesta annetun lain 3 §:n muuttamisesta (HE 304/2018) (30 Dec. 2021), available at https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/HE_304+2018.pdf.

155. Meaning taking into account the fact that the tax is fully credited in the other state. See above.

156. See the relevant discussion provided in section 2.C.

157. In parts of literature, the latter is used as a basis for the argument that mutual recognition does not exist in the case law on charities. See S. Hemels, in C.H.J.I. Panayi, W. Haslechner and E. Traversa (eds.), *Research Handbook on European Union Taxation Law*, sec. 4.2. This is certainly true, i.e. there is no automatic mutual recognition of foreign charities. However, that does not mean that foreign equivalent regimes cannot be mutually recognized.

158. Case C-480/19 *E, Veronsaajien oikeudenvontayksikkö*.

159. *Ibid.*, para. 15.

160. *Ibid.*, para. 7–14.

161. In more technical terms, the Luxembourg fund was, based on its statutory legal form, treated as a limited liability company in Finland. As such, the Finnish rules on the taxation of dividend income included in sec. 33a–33d of the Finnish Income Tax Act (ITA) applied. These rules strive to mitigate economic double taxation of dividend income and foresee different tax consequences at the level of the recipient in dependence on the nature and circumstances of the dividend distributing company. Due to the Luxembourg SICAV not fulfilling the legal form criterion nor the minimum taxation criterion included in sec. 33c Finnish ITA, the income was taxed as employment income and thus subject to tax at a progressive rate of up to 50%. See M. Scherleitner, 50 *Intertax* (2022b), at sec. 2.2. For more detail on the Finnish dividend taxation regime, see M. Helminen, *Finnish International Taxation* (Alma Talent, 2021), ch. 10.

legislation.¹⁶² Had the Court wanted to remain in the unilateral perspective – which it did not do – it would probably have established comparability on the basis of a *Lenz/Manninen* logic which is the standard comparability test for incoming dividends.¹⁶³ It begins from the perspective of the recipient of the dividend income that is subject to a special tax treatment in a domestic scenario treatment upon which it is tested whether, considering the goal of these rules, the recipient of foreign income is a comparable situation.¹⁶⁴ This is interesting because, at least prima facie, it would have appeared defensible to transfer this (unilateral)¹⁶⁵ logic to the *E* case. From the perspective of either rule applicable in the domestic scenario, that is, capital income taxation for distributions from Finnish funds and the rules aiming to mitigate the economic double taxation of the income,¹⁶⁶ the receiver of domestic income may not be in a different position than the recipient of cross-border income.

Yet, the Court did not go this way.¹⁶⁷ Instead, it took a global view and considered the fund regime in Luxembourg in the comparability test.¹⁶⁸ Thereafter, it established the goal of the Finnish fund taxation system as ensuring single taxation at the investor's level¹⁶⁹ upon which it examined the fund taxation regime to which the Luxembourg fund was subject.¹⁷⁰ Given that the Luxembourg fund taxation regime, just as the Finnish one, foresees an exemption for the fund and provides for taxation only at the level of the investor, the Luxembourg fund is considered to be in a comparable situation to a Finnish fund.¹⁷¹ The fact that the legal form of a Luxembourg fund is different than that of a Finnish fund does not change this.¹⁷² Neither did it matter that the

162. Case C-480/19 E, Veronsaajien oikeudenvallontayksikkö, para. 49.

163. To be clear, this can also be seen differently. In fact, authors have made different sense out of the need expressed in *Manninen* to provide for an imputation credit for the foreign tax. This has led some authors to conclude that the case involves mutual recognition. J. Ghosh, 16 *Cambridge Yearbook of European Legal Studies* (2014), p. 213, for instance, regards *Manninen* and even *Lenz* as being examples of mutual recognition. While this position is not shared here, it is defensible when one is prepared to follow Ghosh's very broad view of what contains mutual recognition. Additionally, E. Kemmeren, in L. Hinnekens and P. Hinnekens (eds.), *A Vision of Taxes within and outside European Borders – Festschrift in Honor of Frans Vanistendael* regards *Manninen* as an example for an internal market approach since, ultimately, the tax levied by the source state is credited. Also this view is defensible in light of the working definition used by the author. However, others, including the author of this article, regard both *Lenz* and *Manninen* as unilateral cases because it is, after all, the decision of the Member State to provide relief in a domestic setting, and the mechanism foreseen for such dividends is, upon taxing the inbound dividend, to be extended to a cross-border situation. See further, e.g., P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law*, at sec. 14.4.2., or G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), p. 1024 et seq.; C.H.J.I. Panayi, *European Union Corporate Tax Law*, p. 199–200; and, for a detailed account, N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, sec. 14.2.6.2.4.

164. Case C-315/02 Anneliese Lenz v. Finanzlandesdirektion für Tirol; and Case C-319/02 Petri Manninen.

165. Case C-315/02 Anneliese Lenz v. Finanzlandesdirektion für Tirol.

166. See also footnote 38.

167. For further considerations on why the Court could have abstained from this view and what this could mean, see M. Scherleitner, 50 *Intertax* (2022a), sec. 3.3.

168. Case C-480/19 E, Veronsaajien oikeudenvallontayksikkö, para. 51.

169. Case C-480/19 E, Veronsaajien oikeudenvallontayksikkö, para. 50. It also referred to the goal of provisions concerning the tax treatment of dividends received by natural persons as being designed to ensure that the income of a company is also taxed at the shareholder level while providing for the mitigation of the double taxation of that income.

170. *Ibid.*, para. 51.

171. *Ibid.*

172. *Ibid.*, para. 52–54. Note that it is ultimately the legal form of the Luxembourg fund that gives rise to the taxation of the income as employment income since this causes it to being equated to a public limited company. This effectuates the relevant rules for foreign dividend income that, in this case, give rise to the income being subject to progressive rates. In

former is subject to a subscription tax that is a form of wealth tax.¹⁷³ The Court also clarified that, due to the UCITS directive not harmonizing the tax treatment of investment funds and the income distributed by them, the fact that the SICAV is a UCITS does not mean that it is in a comparable situation as a Finnish UCITS on the mere grounds that both are UCITSs.¹⁷⁴

Is this an equivalence test of the type found in *A SCPI*? What could *prima facie* speak against this is the observation that what is ultimately at stake is – despite the different formulation of the Court – not the comparability of the situation of a Luxembourg fund and a Finnish fund. Instead, it is the comparability of the situation of a Finnish investor investing in a Luxembourg fund and a Finnish investor investing in a Finnish fund. This perspective is not different than the above-mentioned *Lenz/Manninen* comparability that likewise makes a general assumption on the fact that the dividend to be relieved from economic double taxation has been subject to corporate income tax before distribution.¹⁷⁵ However, in *E*, the Court never focused on the investor but rather examined the entire system. This is a remarkable step because it suggests that the Court is, just as in *A SCPI*, willing to take proper account of the fact that investment funds involve multiple and non-separable layers.¹⁷⁶ From this perspective – and also noting that the free movement of capital protects both sides of the transaction¹⁷⁷ – it seems understandable that the Court makes comparability dependent on the equivalence of the whole Luxembourg fund regime.

4. *UBS Real Estate (Case C-478/19)*. During the time between the decisions of *E* and *A SCPI*, the *UBS Real Estate (C-478/19)* case was decided.¹⁷⁸ The latter dealt with a tax advantage – the reduction in mortgage registration tax and land registration fees – that Italy only granted to closed funds.¹⁷⁹ Open-ended funds, on the contrary, could not be awarded the benefit.¹⁸⁰ Residence was not relevant but, given that Italian law only allowed real estate funds to be created as closed-ended, only foreign funds would not qualify for the tax benefit, which is why the Court regarded Italian rules to result in indirect discrimination.¹⁸¹

a wholly domestic scenario, on the other hand, the income distributed by a domestic (contractual) fund and the income distributed by a domestic company is always capital income (that can potentially be taxed somewhat differently). Hence, with respect to Finnish entities' income distributing entities, a differentiation between employment income and capital income based on the legal form is not made.

173. The annual subscription tax (taxe d'abonnement) applies to both the contractual and corporate UCITSs at the standard rate of 0.05% of the UCITSs' net assets. See J. Lamotte and J. Wantz, 'Luxembourg', in IFA (eds.), *Investment Funds* (IFA Cahiers, 2019), sec. 1.1.1.2.

174. Case C-480/19 E, *Veronsaajien oikeudenvälontayksikkö*, para. 45 et seq.

175. Whereby the amount of corporate tax is of no relevance as long as it is positive, i.e. as long as there is economic double taxation. Relevantly, in Case C-319/02 *Petri Manninen*, para. 34, the Court held that with the source state eliminating the economic double taxation (e.g. by exempting the income) the situation of a shareholder of a domestic company would not be comparable to the shareholder of a foreign company. See, for further elaborations on this in the context of the Case C-480/19 E, *Veronsaajien oikeudenvälontayksikkö*, M. Scherleitner, 50 *Intertax* (2022a), sec. 3.3.

176. See Case C-480/19 E, *Veronsaajien oikeudenvälontayksikkö*, sec. 3.1–3.2.

177. E.g. Case C-35/98 *Verkooijen*, EU:C:2000:2943, para. 33–34; In more detail, e.g. A. Cordewener, *Der Anwendungsbereich der Grundfreiheiten*, in M. Lang (ed.), *Europäisches Steuerrecht* (DSuG Tagungsband, Otto Schmidt, 2018), p. 230 et seq.

178. Case C-480/19 E, *Veronsaajien oikeudenvälontayksikkö*; Case C-342/20 A *SCPI v. Veronsaajien oikeudenvälontayksikkö*; Case C-478/19 *UBS Real Estate*.

179. According to Case C-478/19 *UBS Real Estate*, para. 5, in Italian law a 'closed-ended fund' means a mutual investment fund in which the right to redemption of shares is granted to participants only at predetermined deadlines.

180. *Ibid.*, para. 2 et seq.

181. *Ibid.*, para. 40–43.

In the comparability analysis, the Court focused on the goal of the measure and the relevant distinguishing criteria and emphasized that the aim of the measure is not clear to it.¹⁸² As a result and leaving the verification to the national court, it conducted three different comparability tests based on the alleged goals that were brought forward in the proceedings.¹⁸³ If the referring court would conclude that the goal of the reduction was to mitigate the double taxation funds that constantly buying and selling real estate are subject to, then open- and closed-ended funds would be in a comparable situation because both are exposed to this risk of double taxation.¹⁸⁴ If, on the other hand, the referring court would conclude that the goal was to 'promote and encourage the creation of closed-ended funds, which do not stem from highly speculative and uncertain intentions, and to limit the systemic risks on the real estate market',¹⁸⁵ this does not render an open- and closed-ended fund to be incomparable in light of the tax advantage in question.¹⁸⁶ If only the purpose and content of the rule matters – that is, in colloquial terms, the granting of a tax advantage for the sake of granting a tax advantage – the Court regarded a closed and open fund to appear to be in a comparable situation with respect to the tax advantage insofar as they each pursue the activity of acquiring and subsequently reselling real estate liable to be taxed twice.¹⁸⁷ Thus, comparability was assumed in each case. The Court went on to the justification analysis where it accepted, subject to the proportionality of the measure being confirmed by the national Court, a new justification, specifically the above-mentioned limiting of systemic risks in the real estate market.¹⁸⁸

In an attempt to fit this into the above *ASCI* and *E* logic, the first question that comes up is why the Court has not decided the case already in the comparability analysis. It would have seemed conceivable, after *E*, that the Court again looked at the (in this case alleged) goal of the Italian system based on which it could have declared the German open fund to be in a situation that is non-comparable. Even if this was not the actual goal (the ECJ did not ultimately know),¹⁸⁹ it would have been possible to provide the national Court with guidance on how to proceed had it regarded the tax advantage to be provided for this purpose. Italy would have won in the case that the referring court regarded this to be the goal of the rules. The only difference is that there is no further proportionality analysis.¹⁹⁰

That being said, the fact that the Court went further to the justification analysis does not disprove the relevance of mutual recognition. As a simple thought experiment shall demonstrate, the opposite may well be true. Assume, merely for the sake of the argument, that the foreign legal order allows open funds but, nevertheless, includes some mechanisms that sufficiently safeguard the Italian

182. *Ibid.*, para. 47–49.

183. *Ibid.*, para. 50–54. The discussion below is conducted in a different order than the comparability analysis of the judgment.

184. *Ibid.*, para. 56.

185. The underlying risk is the following: A decrease in real estate prices might induce many participants in open-ended investment funds to request the early redemption of their shares. This could lead to the absorbance of the fund's liquidity reserves for which, as a result, the fund would be forced to sell real estate – potentially below its normal value – to be able to meet the redemption requests. See *ibid.*, para. 50. as well as Opinion of Advocate General Gerard Hogan in Case C-478/19 *UBS Real Estate*, EU:C:2021:148, para. 90, referring to this as a snowball effect and implying, on plausible grounds, that the under-value selling of real estate by the fund reinforces the market crisis.

186. Case C-478/19 *UBS Real Estate*, para. 57.

187. *Ibid.*, para. 58.

188. *Ibid.*, para. 73.

189. *Ibid.*, para. 49 and 55.

190. M. Scherleitner, 50 *Intertax* (2022a), sec. 3.2., ignorantly expands this deviation from the *E* approach too far as meaning a decision against mutual recognition. The below shows that this view needs to be refined.

policy interest that was accepted as a justification, that is, the limitation of the systemic risk of the real estate market. Stated otherwise, assume that the German system was equivalent. Where would this difference show up? Would it be the comparability analysis such as in *A SCPI* and *E*? Likely not, because – as demonstrated by the actual judgment – comparability was given anyway in light of the goal to limit the systemic risk of the real estate market.¹⁹¹ Would it be the proportionality analysis? The answer is likely affirmative because it would appear non-proportionate to uphold the discrimination when the foreign system safeguards the same interest that was accepted as justification. The latter again corresponds to the typical approach to mutual recognition.¹⁹² The author does not know whether the German system indeed included such mechanisms. Neither, it seems, did the ECJ that left the proportionality test to the national court. For the purposes of the argument, it also does not matter. What counts is the fact that, if the Italian Court found such an equivalent mechanism to exist in Germany, it would, in this respect, have to regard the national rule as being disproportionate.¹⁹³ In the event that it does not reach this conclusion, it can uphold the national regulations – if there are no other arguments speaking against the proportionality of the rules. Consequently, the equivalence of the other system would have mattered, and the fact that the other system was not equivalent does not mean that equivalence is not relevant. It is quite the opposite.

What explains the dogmatic differences between *A SCPI* and *E* on the one hand, and *UBS* on the other hand, that is, why was the equivalence test included in the comparability analysis in the former cases but (potentially) in the proportionality analysis in the latter? Is it the fact that there was equivalence in *A SCPI* and *E* and potentially none in *UBS*? This would not appear compelling because it would, per se, be difficult to understand why the positive or (potentially) negative result should determine where to include the analysis.

Is it because *A SCPI* and *E* were much clearer than *UBS*? Although the author obviously does not know, this would appear to be conceivable. After all, the equivalence argument is dependent upon the purpose of the rules. The purpose of a rule can, on the one hand, be a yardstick for comparability – which is, as mentioned, rather frequent in direct taxation cases.¹⁹⁴ When a case is decided in favour of the Member State on the basis of incomparability, it must be clear that the purpose of the rule is, as such, acceptable.¹⁹⁵ This is because, through incomparability, what will remain are the impediments on the internal market caused by the national rules discriminating in the name of this purpose.¹⁹⁶ On the other hand and upon comparability being established, the purpose of a rule can also serve as a justification. The question is again the same: Is the purpose of the rule such that can justify, that is, heal, the prima facie infringement of the fundamental freedoms? If not, the Member State loses. If yes, the examination continues with the proportionality analysis. Equivalence arguments can become relevant at either the comparability stage (comparable due to being subject to an equivalent set of rules) or in the proportionality analysis (upholding the

191. See the third comparability test provided in Case C-478/19 *UBS Real Estate*, para. 57.

192. See the discussion and references provided in section 2.

193. Case C-478/19 *UBS Real Estate*, para. 73.

194. For a discussion of different types of comparability analyses used in tax cases, see, e.g., J. Englisch, in M. Lang (ed.), *Europäisches Steuerrecht*, p. 280.

195. Note that literature has proposed opposing concepts for establishing comparability. See especially, and with further references, J. Englisch, 'Taxation of Cross-Border-Dividends and EC Fundamental Freedoms', 38 *Intertax* (2010), sec. 4.1.2. suggesting that comparability is to be based on the question of substitutability between the cross-border transaction and a sufficiently similar domestic transaction.

196. Without, notably, proportionality being tested. Literature criticizes this as a major flaw of the comparability analysis. See for an overview, e.g. M. Scherleitner, 50 *Intertax* (2022b), sec. 7.

discrimination not proportional due to being subject to an equivalent set of rules). The difference is ultimately the intensity of the examination.

Had the intention of the Court been to accept the comparability in *A SCPI* and *E* on the simple assumption that the neutrality notion of the Finnish fund taxation system is a reasonable basis for the establishment of comparability and sending Finland into the losing battle of finding an additional justification while it regarded the argument limitation of the systemic risk of the real estate market to require further scrutiny, the author would be inclined to understand this logic. This is further reinforced by the discussion below on the *Pensioenfonds Metaal en Techniek (PMT)*,¹⁹⁷ which, in the author's view, demonstrates the downsides of the Court remaining all too easily in the comparability analysis, instead of taking a more holistic view on the matter in the proportionality analysis.

5. *Köln-Aktienfonds Deka (Case C-156/17)*. In *Köln-Aktienfonds Deka*, a German fund (KA Deka) claiming back the WHT levied on Dutch sourced dividends was at stake.¹⁹⁸ The Netherlands denied the refund because the German fund did not qualify for the status of a fiscal investment enterprise (FIE).¹⁹⁹ Upon a more complex elaboration, the Court found the Dutch rules, while formally neutral, could factually place cross-border situations at a disadvantage.²⁰⁰ Refraining from delving more comprehensively into that, the author intends to select one aspect of the case that is of relevance for this article.

The Dutch investment fund regime binds the exemption from source tax to the requirement of the fund fully distributing the proceeds to its investors on a yearly basis within eight months at the end of the financial year.²⁰¹ *Köln-Aktienfonds Deka* was a German fund that was subject to a tax-transparent tax regime. As a consequence, all of its proceeds have been taxable at the investor level either as direct distributions or as what is referred to as deemed distributions.²⁰² In this regard, the question was whether the German fund is in a comparable situation to a Dutch fund.

The AG suggested to simply accept an *ACT/Denkavit* comparability.²⁰³ *Prima facie*, it would have appeared understandable for the Court to follow the suggestion.²⁰⁴ After all, the shifting of the tax burden to the unitholder is, at the same time, a mitigation of economic double taxation at the fund level. Whatever reason underlies the redistribution requirement, it remains that the shift of taxation to the unitholders is what allows and demands the mitigation of economic double taxation at the level of the fund.²⁰⁵ The Court, however, was prepared to regard the situation at stake to

197. Case C-252/14 *Pensioenfonds Metaal en Techniek (PMT)*, sec. 4.4.

198. Case C-156/17 *Köln-Aktienfonds Deka*, the author analysed the case already in M. Scherleitner, 50 *Intertax* (2022b), sec. 4.

199. For the criteria, see Case C-156/17 *Köln-Aktienfonds Deka*, para. 16–25; for a more detailed discussion of the case see, e.g. Eric C.C.M. Kemmeren, 'The Netherlands I: Köln-Aktienfonds Deka (C-156/17): Refund of Dividend Withholding Tax for a Foreign Investment Fund', in Michael Lang et al. (eds.) *CJEU - Recent Developments in Direct Taxation 2017* (Linde, 2018); R. Adema, 'A Commentary on the ECJ's Decision in the Dutch Köln-Aktienfonds Deka Case and What Goes Beyond', 22 *Fin. & Cap. Mkts* (2020).

200. See Case C-156/17 *Köln-Aktienfonds Deka*, para. 48 et seq (on the second question) and para. 69 et seq. (on the third question) – in each case subject to verification by the national court.

201. *Ibid.*, para. 9.

202. *Ibid.*, para. 19.

203. Opinion of Advocate General Giovanni Pitruzzella in Case C-156/17 *Köln-Aktienfonds Deka*, EU:C:2019:677, para. 115 et seq.

204. See also M. Scherleitner, 50 *Intertax* (2022b), sec. 4.

205. Compare, Opinion of AG Giovanni Pitruzzella in Case C-156/17 *Köln-Aktienfonds Deka*, para. 111–132.

be incomparable should it turn out at the level of the national Court that the goal of the Dutch redistribution requirement was to get the profits as soon as possible to the investors.²⁰⁶ Under these circumstances, a German fund is not in a comparable situation if it does not actually distribute the profits. However, if the goal is (just) to shift the taxation to the unitholders, the German fund is comparable because, via the actual and deemed distributions foreseen in the German fund taxation system at stake in *Köln-Aktienfonds Deka*, the profits of the fund are allocated to the investors for tax purposes.²⁰⁷

Was this an equivalence test as well? It could be stated as such because what is of relevance is the question of whether the German system fulfils the policy interest of the Dutch system. What immediately raises attention, however, is the harshness of the Court. At least to the author, it seems difficult to understand why, for the purposes of the access to the Dutch fund taxation regime, the mechanics of shifting the tax burden to the investor matter so much that the Court is prepared to potentially regard the situations to be incomparable.²⁰⁸ After all, both systems yield the same tax outcome. For sure, it makes a difference for the investor whether the income of the fund is capitalized in its participation in the fund or whether it receives it in cash as a result of mandatory distribution requirements.²⁰⁹ However, this appears to be a relatively minor difference when considering the fact that the denial of comparability effectuates a tax that will subsequently fundamentally create a difference from the investor's perspective.²¹⁰

6. Fidelity (Case C-156/17). Another interesting investment fund case in the search for mutual recognition elements is *Fidelity* (C-156/17).²¹¹ In brief, the system at stake taxes outgoing dividends to foreign funds, but exempts dividends paid to Danish funds; but only if the fund makes a minimum distribution or calculates a minimum distribution, from which tax it withholds a tax.²¹² With the distinction being made based on residency, comparability was established based on the *ACT/Denkavit* formula.²¹³ The goal of the Danish tax system to shift the tax burden to the investor goes hand in hand with the need to accept that, under this logic, the foreign investor cannot be taxed.²¹⁴ The Danish rule was nonetheless justified due to it safeguarding the coherence of the tax system.²¹⁵ The tax advantage of the exemption from tax is directly connected to the disadvantage, specifically levying a withholding tax.²¹⁶ However, it is not proportional to uphold this rule if the foreign fund itself withholds a tax equivalent to the Danish tax.²¹⁷

206. Case C-156/17 *Köln-Aktienfonds Deka*, para. 80.

207. *Ibid.*, para. 81.

208. Compare M. Scherleitner, 50 *Intertax* (2022b), sec. 4.

209. Which is essentially the difference between the Dutch system (foreseeing mandatory distribution) and the German system (attributing the income to the investor via a system of actual and deemed distributions).

210. It remains to be mentioned that Dutch Supreme Court accepted that a deemed payment by the German fund was sufficient for meeting the distribution requirement. Dutch Supreme Court, 23.10. 2020, ECLI:NL:HR:2020:1674. See for the critique, see already M. Scherleitner, 50 *Intertax* (2022b), sec. 4.

211. Case C-480/16 *Fidelity Funds and Others v. Skatteministeriet*. The author has analysed the case already in M. Scherleitner, 50 *Intertax* (2022b), sec. 3.

212. Case C-480/16 *Fidelity Funds and Others v. Skatteministeriet*, para. 3.

213. *Ibid.*, para. 50 et seq.

214. *Ibid.*

215. *Ibid.*, para. 77 et seq.

216. *Ibid.*

217. *Ibid.*, para. 83 et seq.

Various aspects of the case are of special interest for this article. First, coherence is an often invoked but rarely accepted justification grounds.²¹⁸ The Court is normally very strict in demanding that the advantage and disadvantage concern the same tax and the same taxpayer.²¹⁹ However, in *Fidelity*, this was different, and the Court accepted the connection of an advantage and a disadvantage for two different persons, namely, the fund (that is exempt) and the investor (on behalf of which the tax is levied).²²⁰ The fact that the Court was prepared to do so again suggests that the ECJ accepts the inseparable connection between the different layers of an investment fund structure.

Secondly, the Court again provided for an equivalence test this time in the proportionality analysis.²²¹ Once the foreign fund qualifiedly withholds a tax, that is, once the foreign fund is subject to an equivalent regime, the Danish WHT cannot be levied; otherwise, it can.²²² Again, there seems to be an extraordinarily narrow understanding of equivalence because, when the ECJ demands that the 'latter pay a tax that is equivalent to the tax which Danish Article 16 C funds are required to retain, as a withholding tax, on the minimum distribution calculated in accordance with that provision',²²³ it may be possible that foreign funds subject to (slightly) different rules than the Danish regulations would no longer be considered equivalent.

Furthermore, it is interesting to see the differentiation made by the ECJ between *Fidelity* and *ASCI*. On the one hand, both systems are such that foresee taxation solely at the shareholder's level. In *ASCI*, this matters in the comparability analysis: a foreign system that does not foresee these consequences is not equivalent and thus not comparable.²²⁴ Based on that, the Member State can uphold the discriminatory source tax. On the other hand, in *Fidelity* – as later confirmed in this respect by *AllianzGI* – comparability was given.²²⁵ Denmark thus needed to proceed forward to the justification analysis where it could, via the proportionality test, reach the same result as in *ASCI*. Unless the foreign system is equivalent, discriminatory source tax can be upheld. The author would assume that the difference between these cases is remarked by the fact that the system in *ASCI* does not include a differentiation based on the seat while the system in *Fidelity* does. The (simpler) acceptance of comparability in *Fidelity* based (merely) on the *ACT/Denkavit* formula could be associated with the Danish system's more problematic differentiation based on the seat. However, the fact that the Court took the additional requirement for Danish funds into account in the later parts of the examination suggests that it does not strive towards an outcome that treats foreign funds more favourably than domestic funds which would be the case if only domestic funds have to fulfil this additional withholding requirement. This would at least be a sensible explanation, especially when remembering that at stake is an interpretation of the fundamental freedoms that are ultimately rules that should improve allocation efficiency via decreasing (certain) distortions. Their interpretation should not itself – as convincingly held

218. More generally on the topic see, e.g. C. Staringer, 'Missbrauchsbekämpfung, Aufteilung der Besteuerungshoheit und Kohärenz in der Rechtsprechung des EuGH', in M. Lang (ed.), *Europäisches Steuerrecht* (DStJG Tagungsband, Otto Schmidt, 2018).

219. Compare, e.g. M. Helminen, *EU Tax Law*, sec. 2.3.5.

220. Case C-480/16 *Fidelity Funds and Others*, para. 77–82. See, for a broader discussion on this question and in support of the ECJ's decision, Opinion of Paolo Mengozzi in Case C-480/16 *Fidelity Funds and Others*, EU:C:2017:1015, para. 67 et. seq., and especially para. 75.

221. Case C-480/16 *Fidelity Funds and Others*, para. 84.

222. *Ibid.*, para. 83 et seq.

223. *Ibid.*, para. 84.

224. See section 4.C.2.

225. See above, as well as section 4.D.

elsewhere – give rise to distortions.²²⁶ This would be the case, however, if striking down rules that disadvantage cross-border situations causes an outcome that advantages cross-border situations.

7. *L Fund (Case C-537/20)*. The most recent case investment fund tax case, *L Fund (C-537/20)*, concerns a Luxembourg property fund set up as a specialized investment fund under Luxembourg law.²²⁷ It had two non-German institutional investors and received income from the letting and sale of German real estate.²²⁸ While the Luxembourg fund was subject to tax transparency in Luxembourg,²²⁹ the German Bundesfinanzhof regarded the Luxembourg fund to be opaque based on a resemblance test.²³⁰ Due to being foreign, it was not entitled to the tax exemption to which German funds are subject.²³¹ Thus, it was taxed on the German income.²³² With respect to German funds, on the other hand, a tax-transparent system applies. For this purpose, the fund, which is a corporate tax subject, is granted an exemption, but this goes directly hand in hand with the taxation of the actual and deemed distributions of the fund at the level of the domestic investor.²³³ Foreign investors in a German specialized property fund are directly attributed income from property, which means that tax transparency is also upheld here.²³⁴

The ECJ regarded the German rule to create a restriction on the free movement of capital.²³⁵ In the following comparability analysis, the ECJ regarded the goal of the German rules to be the taxation of the income from property of resident specialized property funds with non-resident institutional investors at the level of the latter (investors) and not the former (fund).²³⁶ This is to 'implement the transparency principle, under which income is taxed only once, and to ensure equality of treatment between direct investments and investments made through an investment fund'.²³⁷ Thereupon, the Court underlines that Germany taxes the foreign fund because it cannot tax foreign investors of the foreign fund.²³⁸ Differently from what was suggested by the Bundesfinanzhof, the

226. Further, see B. Strassburger, *Die Dogmatik der EU-Grundfreiheiten: Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung*, p. 7–83.

227. As held in the preliminary ruling request, a fonds commun de placement (FCP) set up as fonds d'investissement spécialisé (SIF) was at stake. See Bundesfinanzhof, *EuGH-Vorlage vom 18. Dezember 2019, I R 33/17 Unionsrechtmäßigkeit der Fondsbesteuerung nach dem InvStG 2004* Bundesfinanzhof ECLI:DE:BFH:2019:VE.181219.IR33.17.0 [2].

228. Case C-537/20 *L Fund v. Finanzamt D*, EU:C:2023:339, para. 13 et seq.

229. *Ibid.*

230. Bundesfinanzhof, *EuGH-Vorlage vom 18. Dezember 2019, I R 33/17 Unionsrechtmäßigkeit der Fondsbesteuerung nach dem InvStG 2004*, para. 27 et seq.

231. Case C-537/20 *L Fund v. Finanzamt D*, para. 21.

232. *Ibid.*, para. 16 et seq.

233. *Ibid.*, para. 24; Bundesfinanzhof, *EuGH-Vorlage vom 18. Dezember 2019, I R 33/17 Unionsrechtmäßigkeit der Fondsbesteuerung nach dem InvStG 2004*, para. 41 et seq.

234. Case C-537/20 *L Fund v. Finanzamt D*, para. 25; *EuGH-Vorlage vom 18. Dezember 2019, I R 33/17 Unionsrechtmäßigkeit der Fondsbesteuerung nach dem InvStG 2004*, (n. 105) para. 44 et seq. See in more detail on the attribution of the income from property received by such a fund within German territory, e.g. T. Ackert and M. Füchsl, '§ 15 InvStG', in F. Haase (ed.), *Investmentsteuergesetz* (Schäffer-Poeschel, 2015) para. 436 et seq.

235. Case C-537/20 *L Fund v. Finanzamt D*, para. 47–53.

236. *Ibid.*, para. 55.

237. *Ibid.*, para. 55.

238. *Ibid.*, para. 56.

ECJ regarded the differentiation criteria not to be the taxation of the investor²³⁹ but the seat of the fund. Ultimately, it was only domestic funds and not foreign funds that are exempt from corporate tax.²⁴⁰ As in *Fidelity*,²⁴¹ the Court held that Germany, which shifts the level of taxation to the investor, must accept that it cannot tax the foreign investor, and cannot make up for this by taxing the foreign fund.²⁴² In this regard, the Court also stresses that, if Germany is serious about shifting the taxation to the level of the investors, it should extend the exemption to the foreign fund when its investors are taxed.²⁴³ Furthermore, the Court states that it is possible that the foreign fund has German investors that Germany could tax.²⁴⁴ From that perspective, a non-resident fund is in an objectively comparable situation to that of a resident fund.²⁴⁵ It is unnecessary and incoherent to tax foreign funds for the sake of ensuring the taxation of investors to the extent that the foreign fund has domestic investors.²⁴⁶ In addition, the Court holds that:

resident and non-resident funds are in a comparable situation with regard to the objective pursued by the transparency principle, namely to ensure equal treatment between direct investments and investments made through an investment fund. The income from property of resident funds is only taxed at the level of their investors for the purpose of achieving that objective.²⁴⁷

This statement is interesting because it again seems to suggest that the Court makes comparability dependent on the fact that the foreign fund is subject to the same system as the domestic fund. Problematically, the Court does not clearly express this. Rather, it seems to make a very general statement with respect to ‘resident and non-resident funds’ being comparable with respect to the objective of the transparency principle after which it refers to the taxation of the German fund achieving this goal. The question as to whether the Luxembourg system fulfils this objective is – differently from other judgments – not explicitly addressed.²⁴⁸ Nonetheless, the Luxembourg fund was subject to tax transparency and thus subject to an equivalent regime as the German fund. This was clear to the Court.²⁴⁹ Given that the Court adopts this perspective in the comparability analysis and, based on it, declares the situations to be comparable, suggests that equivalence mattered here as well.

239. Bundesfinanzhof, *EuGH-Vorlage vom 18. Dezember 2019, I R 33/17 Unionsrechtmäßigkeit der Fondsbesteuerung nach dem InvStG 2004*, para. 59–60.

240. Case C-537/20 L *Fund v. Finanzamt D*, para. 57. In addition, the rule attributing the income from property directly to foreign investors applies only with respect to German specialized property funds and not foreign funds.

241. For the sake of clarity, the *ACT/Denkavit* formula for the testing of comparability was not relied on despite there being a differentiation based on the seat. The reason for this lies in the case not being about the taxation of dividend income (where economic double taxation at the level of the fund can occur) but the taxation of property income where this is not possible.

242. Case C-537/20 L *Fund v. Finanzamt D*, para. 56, 60.

243. *Ibid.*, para. 60. Otherwise, Germany itself frustrates the goal of its own system.

244. *Ibid.*, para. 58.

245. *Ibid.*, para. 58; Case C- 480/16 *Fidelity Funds and Others v. Skatteministeriet*, para. 61; Case C-545/19 *AllianzGI-Fonds AEVN*, para. 69.

246. On the coherence argument, see immediately below, and note the elaborations in Case C-537/20 L *Fund v. Finanzamt D*, para. 51–52, on double taxation as well as in the context of the coherence argument *ibid.*, para. 73.

247. Case C-537/20 L *Fund v. Finanzamt D*, para. 59.

248. See, e.g., section 4.C.2., 4.C.3.

249. Case C-537/20 L *Fund v. Finanzamt D*, para. 15.

In the justification analysis, the Court again seems to be principally open to accepting the coherence argument, if – which is for the national Court to determine – ‘the attribution of income from property to non-resident investors and the taxation of resident investors in resident funds compensates for the exemption granted to those funds. In particular, it must determine whether such investors are systematically taxed and cannot benefit from an exemption from that tax.’²⁵⁰ However, with reference to *Fidelity*, the Court regards the German rule to go beyond what is necessary for ensuring the coherence of that tax system. First, the Court holds that the economic double taxation that German investors in foreign funds may be exposed to due to Germany taxing the fund may not always be eliminated. This frustrates the objective pursued by the German system.²⁵¹ Secondly, the ECJ emphasizes that internal consistency of the German tax system could be maintained if non-resident funds could benefit from the exemption, provided that the German tax authorities ensure, with the full cooperation of those funds, that the investors in those funds pay a tax equivalent to that to which investors in a domestic fund are liable.²⁵² Allowing such foreign funds to benefit from that exemption under those conditions would constitute a less restrictive measure than the respective German regime at issue.²⁵³ Although this is not a necessity, it seems that this criterion would be fulfilled especially in situations in which the foreign fund, like the domestic fund, withholds a tax on the distributions that it makes.²⁵⁴

The *L Fund* case thus widely confirms the Court’s approach in *Fidelity* but, contrary to it, seems to include an equivalence test already in the comparability analysis. The difference between the cases in this respect may be explained by the fact that the income at stake in *Fidelity* is a dividend while it was income from property in *L Fund*. Economic double taxation at the fund level can only happen with respect to the dividend which is why the *ACT/Denkavit* formula could be used in *Fidelity*²⁵⁵ but not in *L Fund*. What is interesting, though, is the difference in the coherence test. In *Fidelity*, it was – due to Danish law demanding this – precisely the withholding requirement that the foreign fund must fulfil.²⁵⁶ In *L Fund*, the taxation requirement is more general. This may have to do with the looser approach provided in German law in which the exemption of the fund is not explicitly made subject to the taxation of the investor while a direct link may – subject to confirmation by the national court – still be inferred from it.²⁵⁷ Secondly, and somewhat puzzlingly, in *L Fund* – differently from *Fidelity* – the Court did not focus on the direct link that it was apparently prepared to accept under the coherence argument when it questioned whether Germany went beyond safeguarding coherence. While, for German funds, it questioned whether the taxation of the investors compensates for the exemption of the fund,²⁵⁸ it did not question whether the taxation of the investors in the foreign fund compensates for the exemption of the foreign fund. Instead, the Court focused on the taxation of foreign investors that needs to be equivalent to investors in the domestic fund.²⁵⁹ This can, of course, be different. If the foreign fund is

250. *Ibid.*, para. 71.

251. *Ibid.*, para. 58.

252. *Ibid.*, para. 74, referring to *Fidelity* 84.

253. *Ibid.*

254. The Luxembourg fund did not withhold a tax on the payments made to the investors. See Case C-537/20 *L Fund v. Finanzamt D*, para. 15.

255. See section 4.C.6.

256. Case C- 480/16 *Fidelity Funds and Others v. Skatteministeriet*, para. 4 et seq., 84.

257. Case C-537/20 *L Fund v. Finanzamt D*, para. 70.

258. *Ibid.*, para. 71.

259. *Ibid.*, para. 74.

exempt from a 10% corporate tax, it will be a 10% tax that the investors are to be subjected to for compensating for the exemption. When the tax of the investor in the German fund matters, then the tax burden that the investors in the foreign fund must fulfil a higher taxation requirement.

With that being said, the author doubts whether the Court's approach to refer to actual tax burdens proves workable. After all, the tax situation and the tax treatment of investors can be very different. Apart from that, it is, as worked out in section 3, not the typical idea of investment fund regimes to have investor taxation compensating for the special tax treatment of the fund. Rather, the goal is to eliminate or diminish the disadvantage vis à vis direct investments that would result from the taxation of the fund as a second layer between the investment and the investors.²⁶⁰ Following the Court's understanding would mean that an exempt fund would become taxable on the income if – as is not infrequent in practice – the investor is tax-exempt. This outcome appears rather absurd as the policy decision to exempt the respective investor from taxation would be frustrated due to the taxation of an investment through the fund. This is not what the author has understood to be the idea of the German system; but what is ultimately relevant, and is quite typical, is taking out one layer of taxation (fund) and keeping the other.

D. Mutual recognition in cases involving different taxation techniques for resident and non-resident funds

1. Setting the scene. There are two cases that involve investment fund regimes that apply two different tax regimes for domestic and foreign funds. As a result, at stake is not the question as to whether a certain tax benefit is to be extended to non-resident funds, but whether the application of a certain system to resident funds and a certain different system to non-resident funds is in line with the fundamental freedoms. Below, the first case to be analysed is the pension fund case *Pensioenfond Metaal en Techniek* ("PMT")²⁶¹ which is particularly interesting to contrast with *UBS Real Estate*.²⁶² The second is the recent *AllianzGI* case, which is less spectacular but gives rise to some interesting nuances.²⁶³ The cases will again be analysed with a very clear focus on the search for elements of mutual recognition.

2. Pensioenfond Metaal en Techniek ("PMT"). The *PMT* case concerned a Dutch pension fund that received dividends from Sweden that were subject to a 15% withholding tax. Swedish pension funds, on the other hand, were liable for a capital yield tax.²⁶⁴ The base of this tax consists of the net value of assets at the beginning of the year multiplied by the average government bond yield of the preceding year. The result is taxed at 15%.²⁶⁵ It was not under dispute that the tax burden was heavier for non-resident funds in at least some years.²⁶⁶ Thus, the ECJ held that there was a restriction of the free movement of capital.²⁶⁷

260. See above, section 3.

261. Case C-252/14 *Pensioenfond Metaal en Techniek* (PMT).

262. See on Case C-478/19 *UBS Real Estate*, sec. 4.3.2.2.2.3.

263. Case C-545/19 *AllianzGI-Fonds AEVN*.

264. Case C-252/14 *Pensioenfond Metaal en Techniek* (PMT), para. 3 et seq.

265. *Ibid.*, para. 7–12, and 29 et seq.

266. This is 'admitted' by the Swedish Government, and this assessment is shared by the referring Court. See *ibid.*, para. 42–43.

267. *Ibid.*, para. 47.

Hence, the Court proceeded to perform a comparability analysis. Thereby, it regarded the goal of the measure, that is, the introduction of 'neutral taxation independent of the economic climate surrounding various kinds of assets and all of the kinds of pension products concerned'²⁶⁸ after which it continued to state that 'in order to achieve such an objective, all the assets of a resident pension fund are subject to yearly lump sum taxation, reflecting the yield of those assets, irrespective of the receipt of income generated by those assets, in particular the receipt of dividends.'²⁶⁹ The Court recognized that Sweden cannot tax all of the assets of non-resident pension funds on a yearly basis.²⁷⁰ Thus, it holds that the objective of the Swedish measure cannot be achieved with respect to foreign funds. The Court also does not consider it to be possible to mirror the taxation of resident funds in the context of taxing the dividend as the Swedish system demands annual taxation of the entire invested capital.²⁷¹ Consequently, the ECJ concluded by stating that, with respect to the rule at issue, non-resident pension funds are not comparable to Swedish pension funds.²⁷² Thus, Sweden won.

The *PMT* case was heavily criticized in literature particularly because it is very difficult to reconcile with the earlier *Miljoen* case that likewise imposed two different systems for dividends.^{273,274} The author himself joined the chorus of voices that flagged the risk of the Court freely affording opportunities for Member States to engineer their way out of the limitations under the fundamental freedoms by designing tax systems applying in a domestic context in the light of which the cross-border situation is not anymore comparable.²⁷⁵

This concern does not disappear. However, after *A SCPI* and *UBS*, it may be on point to see *PMT* with fresh eyes. Actually, *PMT* almost seems like a prototype for the equivalence test logic of *A SCPI* – and it shows the inherent limitations of making this test already in the context of the comparability analysis. The Court not only took for granted that the goal of the Swedish system is worth protecting and that the foreign system does not fulfil these goals. Rather, via deciding the case in the comparability analysis, it did not have the national Court to take a look at the other system. This would, however, seem to have been necessary, because when the underlying value of the Swedish system is acceptable in the first place, why should it then be allowed for Sweden to frustrate, via the levying of a withholding tax, the functioning of another state's system that is built on the same value? For sure, it could have been simply clear to the ECJ that the Dutch system does not

268. Ibid., para. 53.

269. Ibid., para. 54.

270. Ibid., para. 58.

271. See *ibid.*, para. 60. The AG seems to have been more agreeable to this option. See Opinion of Advocate General Maciej Szpunar in Case C-252/14 *Pensioenfonds Metaal en Techniek (PMT)*, EU:C:2015:571, para. 73.

272. Case C-252/14 *Pensioenfonds Metaal en Techniek (PMT)*, para. 63.

273. Dutch dividends were subject to a 15% WHT irrespective of whether they were paid to residents or non-residents. However, while the tax was final for the latter, it is a prepayment for the former for personal or corporate income tax with a refund for the excess being available. In particular, the WHT can be set off against a 30% tax on so-called 'box 3' capital income (a nominal 4% return on the average value of the taxpayer's assets and liabilities minus a tax-free capital allowance of EUR 20,014). See Cases C-10/14, C-14/14 and C-17/14 *C.J.B.G.T. Miljoen and Others v. Staatssecretaris van Financiën Miljoen*, EU:C:2015:608, para. 6–13. This is a special regime that is applicable to Dutch residents that, ultimately, equals a 1,2% wealth tax on the relevant yield basis. See Opinion of Advocate General Niilo Jääskinen, in Cases C-10/14, C-14/14 and C-17/14 *C.J.B.G.T. Miljoen and Others v. Staatssecretaris van Financiën Miljoen*, EU:C:2015:429, para. 57.

274. E.g. H. Vermeulen, 'Cross-Border Dividend Taxation', in P. Wattel, O. Marres and H. Vermeulen (eds.), *Direct Tax Matters in European Tax Law* (Wolters Kluwer, 2019). M. Scherleitner, 50 *Intertax* (2022b), sec. 6.

275. M. Scherleitner, 50 *Intertax* (2022b), sec. 6.

fulfil these goals, which is why it did not bother relaying this to the referring Court to find out. This would, however, be problematic because it gives improper guidance to national Courts that apply EU law and that may be confronted with a situation of equivalence. This argument could be countered and the fact could be invoked that Sweden has a taxation right on the outgoing dividends that it also exercises in a domestic case. The possibility for Sweden to mirror the tax liability of the domestic funds when taxing the distribution of the dividend to the foreign pension fund was also discussed at the level of the Court where it was dismissed because Sweden, in accordance with the tax treaty with the Netherlands, can only tax the dividends.²⁷⁶ On the other hand, to achieve the objective of the Swedish system, specifically the neutral taxation independent of the economic climate surrounding various kinds of assets and all of the kinds of pension products concerned, it is necessary to tax all of the fund's assets.²⁷⁷ While this is certainly true, it could now be argued that this should not be the end of the problem but the beginning of it. Should a Member State be able to afford better treatment for domestic funds and then hide behind the tax treaty as preventing it from imposing the same system on foreign funds? The answer should be no. However, it would be equally odd to forbid Sweden to impose its system on domestic pension funds just because it is not possible to equally impose the system on foreign pension funds.

The way out of this dilemma may, precisely, have been an approach similar to what the Court applied in *UBS Real Estate*.²⁷⁸ Pursuant to it, it could have accepted the Swedish and Dutch funds to be in a comparable situation after which it could have been possible to accept the aim of the neutral taxation independent of the economic climate surrounding various kinds of assets and all of the kinds of pension products concerned as a justification. Thereafter, in the proportionality analysis, the national Court would have been able to take account of whether the foreign system fulfilled this goal as well and, if it did, then it would appear difficult for Sweden to defend levying a tax on the outgoing dividend. Similarly, if it did not fulfil the goal, the tax could have been upheld. The author admits that this argument stands on a shaky ground, since the Court is typically reluctant to accept economic policy arguments as justification.²⁷⁹ However, there is no actual difference between, on the one hand, accepting this as justification due to being the core policy rationale of the relevant domestic tax system and, on the other hand, using this goal as benchmark for comparability. The end result, so it appears, is the acceptance of the system's goal. For sure, in *PMT*, the Court did not pay any attention to the regime to which the foreign fund was subject. Neither did the Court in *UBS Real Estate* – but the fact that the latter includes a proportionality analysis that may allow for this perspective is a key difference and, in the author's view, a key progress.

3. AllianzGI. The second and more recent case involving two different taxation techniques is *AllianzGI*, which deals with a German UCITS fund that received Portuguese dividends that are subject to a 25% withholding tax.²⁸⁰ Dividends paid to a Portuguese UCITS, on the other hand, are not taxed. However, the Portuguese UCITS is subject to a stamp tax – to which foreign funds are again not subject.²⁸¹ Based on this rule, a Portuguese fund has to quarterly pay a tax on the fund's net book value that is between 0.0025% and 0.0125% depending on the nature of

276. Case C-252/14 *Pensioenfond Metaal en Techniek (PMT)*, para. 56.

277. *Ibid.*, para. 59.

278. See section 4.C.4.

279. See further, e.g., J. Kokott, *Das Steuerrecht der Europäischen Union*, p. 259 et seq.

280. In 2015, the tax was reduced to 15% under the tax treaty between Portugal and Germany.

281. See in more detail, Case C-545/19 *AllianzGI-Fonds AEVN*, para. 69, para. 3–16 and see also M. Stöber, 'Taxation of Investment Vehicles and the Free Movement of Capital', 62 *European Taxation* (2022).

the fund.^{282,283} The referring court wanted to know, *inter alia*, whether this different taxation technique used for resident funds can justify the less favourable tax treatment of distributions made to non-resident funds.²⁸⁴

The ECJ found this to result in a restriction of the free movement of capital.²⁸⁵ What followed was an extensive comparability analysis that did not add much insight in terms of what is relevant for this article.²⁸⁶ Other than what may have been expected after the AG opinion,²⁸⁷ the judgment does not refine the above *PMT* doctrine because the Court declared the stamp tax as not being relevant for the question of comparability. This was because it regarded the stamp tax as an asset tax, and thus something different than the income tax to which the dividends were subject.²⁸⁸ Furthermore, the Court paid attention to the fact that the stamp tax not only applies to retained income that it explicitly emphasized to be a difference to *PMT*.²⁸⁹ It mattered to the Court that the resident fund can, at will, escape the stamp tax by immediately distributing the income.²⁹⁰ With the irrelevance of the stamp tax, all that remained was a rather straightforward case: dividends paid to domestic funds are exempt, and dividends to foreign funds are taxed. Based on the *ACT/Denkavit* formula, the situations are comparable.²⁹¹

That being stated, *AllianzGI* still provides an important nuance that has already been implicit in, for instance, *E*. In the testing of equivalence, it is only the same types of tax that appears to matter. Stated in a different manner, when dividend taxes are at stake, the lump sum yield tax of *PMT* was taken into account in the comparability analysis, but the subscription tax in *E* and the stamp tax in *AllianzGI* – both asset taxes – were not.²⁹²

5. What does this tell us?

The above analysis of fund-specific case law provides the following insights. First, mutual recognition elements are included in the case law on tax-transparent funds with regard to the acceptance of foreign documentation. This is nothing special, however, and just a simple extension of the *Meilicke II* (C-262/09)²⁹³ case law to funds.²⁹⁴ The situation is more complex for fund cases that involve tax regimes that provide for an exemption to the fund. In these cases, of which almost

282. Case C-545/19 *AllianzGI-Fonds AEVN*, para. 10.

283. It may be noted that, in accordance with Article 88(11) of the Corporation Tax Code, income of a UCITS formed and operating under Portuguese law is not treated as tax-exempt in the first year following the acquisition of shares. See Opinion of Advocate General Juliane Kokott in Case C-545/19 *AllianzGI-Fonds AEVN*, EU:C:2021:372, para. 13. This was not considered relevant in the judgment. See Case C-545/19 *AllianzGI-Fonds AEVN*, para. 56 et seq.

284. *Ibid.*, para. 29. In addition, it wanted to know whether the tax treatment of investors has to be taken into account in the comparability analysis or whether the analysis has to be limited to the investment fund vehicle.

285. *Ibid.*, para. 37 et seq.

286. *Ibid.*, para. 43–74.

287. Opinion of Advocate General Juliane Kokott in Case C-545/19 *AllianzGI-Fonds AEVN*.

288. Case C-545/19 *AllianzGI-Fonds AEVN*, para. 52–53.

289. *Ibid.*, para. 54.

290. *Ibid.*, para. 55.

291. See, *ibid.*, para. 59 et seq. The Court also reiterated that the decision of shifting the tax burden to the investor goes hand in hand with the impossibility of taxing the foreign investor.

292. Compare also the other cases involving Luxembourg funds, such as Case C-537/20 *L Fund v. Finanzamt D*. See section 4.C.7.

293. Case C-262/09 *Wienand Meilicke and Others v. Finanzamt Bonn-Innenstadt*.

294. See section 4.B.

all concern the taxation of income paid to foreign investment funds, the ECJ takes a relatively strict stance on comparability vis-à-vis fund taxation systems that provide for a differentiation based on the seat of the fund.²⁹⁵ In these cases, the Court does not seem to be prepared to further scrutinize alleged policy goals but to simply declare comparability based on the *ACT/Denkavit* formula that was developed outside the investment fund context.²⁹⁶ While the shifting of the tax burden to the investor level, as shown by *Fidelity* and *AllianzGI*, is not relevant to the Court as a matter that affects comparability, the Court was, in *Fidelity*, nevertheless prepared to allow the source state to uphold a discriminatory tax if, under a strict reading, the foreign fund regime did not include the same withholding mechanism at the level of the fund as the source state's fund regime.²⁹⁷

On the other hand, in cases that involve tax regimes that provide for an exemption of the fund vehicle without there being a differentiation made based on the seat of the fund, equivalence elements are, such as in *Deka*, *A SCPI* and *E*, to be observed already in the comparability analysis.²⁹⁸ This also seems to be true for the *PMT* case that includes the application of two different taxing techniques for domestic and foreign funds,²⁹⁹ as well as *L Fund*, which deals with income from property.³⁰⁰ Yet, it does not seem to apply to *UBS Real Estate* which concerned granting a tax benefit to certain types of funds and that – should the assumptions made above hold – include equivalence elements in the proportionality analysis.³⁰¹

These observations suggest that the ECJ is, in principle, prepared to regard the values underlying a state's fund taxation regime to be accessible to an equivalence test – similar to what appears to be the situation for case law on charities.³⁰² This is not inconsequential. After all, in both cases at stake is a special tax status that a state awards to some entity based on certain reasons. These reasons include a value that can be either enshrined in the functioning of the fund taxation system, such as, for instance, the exemption of the fund in the Finnish system, the withholding tax requirement in *Fidelity*, or the redistribution requirement in *Deka*.³⁰³ Alternatively, it can be an external value that the special tax regime is bound to promote, such as the economic climate neutrality of *PMT*³⁰⁴ or the decrease in systematic risk in the real estate market achieved through the granting of tax benefits to certain kinds of funds, as in *UBS*.³⁰⁵

Is it mutual recognition in the narrower sense? What, *prima facie*, may cast doubts is the fact that equivalence elements are sometimes in the comparability analysis and sometimes in the proportionality analysis. In non-tax cases, on the other hand, it is traditionally the proportionality analysis in which mutual recognition arises, that is, it is not proportionate to impose a second set of rules on top

295. See section 4.C.1.

296. See Case C-303/07 *Aberdeen Property Fininvest Alpha*; Case C-338/11 *Santander Asset Management SGIC Santander*; Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company*; differently in Case C-537/20 *L Fund v. Finanzamt D*, which, however, did not include dividend income.

297. See section 4.C.6.

298. See sections 4.C.2, 4.C.3, 4.C.5.

299. See section 4.D.2.

300. See section 4.C.7.

301. Section 4.C.4.

302. See section 2.C.

303. See sections 4.C.2–4.C.3., 4.C.5–4.C.6.

304. See section 4.C.2.

305. See section 4.C.4.

of a first set of rules that already fulfil the relevant objectives.³⁰⁶ Yet, and as worked out above, given that the Court frequently, including in fund cases, assesses comparability in light of the object and purpose of the rules, this does not conceptually matter.

The ECJ's decision to look across the border towards giving the other foreign fund the general possibility to access the fund regime of the source state through the establishment of comparability is a step towards the internal market goal. At the same time, especially *Deka* and – although here in the proportionality analysis – *Fidelity* as well as *L Fund*, suggest that the understanding of equivalence is very narrow.³⁰⁷ What seems to be demanded is not just sufficient similarity but true equivalence. This is again not unseen in other fields of internal market law where the mutual recognition principle is applied.³⁰⁸ On the other hand, the Court does not appear to take other taxes, such as the subscription tax in Luxembourg or stamp tax in Portugal, into account in testing for equivalency. This is, again, a rather broad approach.

What the author sees as critical – as discussed above – is the undifferentiated inclusion of values into the comparability analysis. This risks, as shown in *PMT*, the examination becoming self-defeating with the Court simply accepting an impediment of the freedoms for a goal that has not yet itself been tested on its worthiness of being accepted. In this context, the author regards the Court's approach provided for in *UBS* as a clear advancement.³⁰⁹ The external policy goal that is connected to the fund regime (here, the prevention of systematic risks in the real estate market) is first addressed in the justification analysis and, upon acceptance, provides a framework for equivalence arguments in the proportionality test. This way, the Court's thinking becomes much more transparent.

Increased transparency in the Court's argumentation is, not in the least, key for addressing the major disadvantage of judicial mutual recognition, that is, the missing foolproofness of the system.³¹⁰ In fact, mutual recognition has once been defined as an intellectual breakthrough but a colossal market failure.³¹¹ The legal uncertainty attached to the question as to whether a Member State may – after long litigation – uphold its denial of mutual recognition by means of a valid public policy argument can induce market participants to avoid the risk from the outset and refrain from exercising their free movement rights.³¹² To general Internal Market lawyers, the issue is well known, and there are numerous initiatives to address the problem.³¹³ Whether such concerns equally matter for – usually well-advised – investment fund activities is difficult

306. See section 2.B.

307. See sec. 4.3.2.2.2.4 and 4.3.2.2.2.5.

308. C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 124.

309. See section 4.C.4.

310. More generally on the workability of mutual recognition, including further references, see C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 106 et seq. S. Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist', 43 *European Law Review* (2017). Note also that there is legislation that should improve the functioning of mutual recognition: Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, OJ L 91.

311. J.H.H. Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO', in F. Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan, 2005), p. 49.

312. See, for instance, with further references, C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 108, including the reference to, G. Wagner, 'The Economics of Harmonization: the Case of Contract Law', 39 *Common Market Law Review* (2002).

313. See footnote 190.

to state. What nevertheless remains is the fact that the contours of the above equivalence test would have to be determined via case law, which is a slow process.

With full harmonization from a current perspective not appearing to be in reach, an option for improvement that could be considered is legislative mutual recognition.³¹⁴ In legislative approaches to mutual recognition, the level of automatization of mutual recognition can be set at different levels, and it may be accompanied by reservations for national provisions protecting a certain public interest and may go hand in hand with minimum harmonization.³¹⁵ Weaker forms of legislative mutual recognition can be made conditional on the fulfilment of certain prerequisites while stronger forms may be (more) automatic.³¹⁶ This way, progress could be achieved while the loss of regulatory autonomy for Member States may be limited. In an area as sensitive as direct tax law, this could be a decisive advantage. Given that the regulatory framework is already harmonized, a significant amount of approximation would also already exist.³¹⁷ Future research should further inquire into the feasibility of such a policy.

6. Conclusion

If the above is correct, there could be two implications. First, how to make sense of foreign funds for the purposes of the domestic legal system would be better understood. It would have to be accepted that a unilateral view is not adequate for investment funds since they include, per definition, at least three layers that cannot be examined in isolation. As such, the Court's approach to looking for equivalence in the other state's fund taxation system is not without merit. It merely continues a national decision across the border. Just as Member States that want to promote a certain benevolent activity need to accept that another Member State's law promotes the same interest, Member States that promote collective investment activity through a certain regime and/or bind to it certain values will have to principally accept an equivalent foreign regime unless there is an acceptable reason not to do so. The above analysis suggests that there are different dogmatic ways the ECJ uses to give effect to this outcome – either taking equivalence into account in the comparability analysis that is contextualized in light of the object and purpose of the rules or in the proportionality analysis after accepting the underlying value to be protected as justification. Future research should study whether legislative mutual recognition could be a progression in the field of the taxation of investment funds.

314. In more detail, W. Roth, in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, p. 439 et seq.; M. Möstl, 2 *Common Market Law Review* (2010); C. Janssens, *The Principle of Mutual Recognition in EU Law*.

315. W. Roth, in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, p. 439 et seq.; M. Möstl, 2 *Common Market Law Review* (2010); See fundamentally on the principle of mutual recognition in secondary legislation, e.g. C. Janssens, *The Principle of Mutual Recognition in EU Law*, p. 67 et seq.

316. *Ibid.*

317. See M. Möstl, 2 *Common Market Law Review* (2010), p. 414: 'It is obvious that the question of how conditional or automatic mutual recognition duties are under secondary legislation and, correspondingly, of how much autonomy the Member States retain or lose to decide upon the necessary level of protection, is closely linked to the degree of substantive approximation of standards which this legislation must try to achieve'. Compare in this regard also R.P.C. Adema, 'The Revised UCITS Directive (UCITS IV): A Missed Chance for Creating Common Rules on the Taxation of UCITS', 41 *Intertax* (2013), p. 140–145; as well as Case C-480/19 E, Veronsaajien oikeudenvallontayksikkö, para. 45 et seq.

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